No. 79-1788

Supreme Court, U. S.
FILED
MAY 9 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARGARET Y. JUSTAK,

Petitioner,

vs.

A. A. BOCHNOWSKI, JOHN D. COCHRAN, KARL J. STIPHER, STEPHEN A. CLAFFEY, CHARLES E. SCHALLIOL, WILLIAM F. SATTERLEE, III, WALTER SCHRAGE, and FIRST BANK OF WHITING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

MARGARET Y. JUSTAK
447-139th Street
Hammond, Indiana
219/931-8277
Petitioner, Pro-Se

ORAL ARGUMENT REQUESTED

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Staatement of the Case 3

Reasons for granting Writ of Certiorari 8

Summary and Conclusion 41

Appendices:

1—Order of Dismissal of Action with Prejudice and Judgment, dated April 8, 1977 (Staffeldt, J.) ....App. 1

2—Opinion of the Indiana Court of Appeals, dated July 23, 1979 (Staton, J.) .....App. 7

3—Order of the Indiana Court of Appeals denying Petition for Rehearing dated August 29, 1979 ..App. 19

4—Order of the Supreme Court of Indiana dismissing Petition for Transfer, dated December 13, 1979 (Givan, Chief J.) .....App. 20

5—Letter with attached Certificate of Filing Petition for Transfer, both dated September 18, 1979 .....App. 21

6—Statement of Postmaster, dated August 13, 1979 .....App. 25

PAGE

7—Affidavits of Dr. John E. Roche, Josephine Chism, Mildred Kroll, and Elizabeth Slivka, all dated October 14, 1976 ..... App. 25

8—Order of United States Supreme Court, dated April 3, 1980 extending time to file Petition for Writ of Certiorari to May 11, 1980 with Notice to opposing counsel ..... App. 38

9—Article of the POST-Tribune dated September 6, 1979 ..... App. 40

AUTHORITIES CITED

Cases Cited

PAGE

Avery v. Alabama, (1940) 308 U.S. 444 35

Bardin v. Mondon, (2d Cir. 1961), 298 F.2d 235 27

Berry v. Hall, 98 F.2d 222, 68 App. Ct. D.C. 350 33

Bozovichar v. State of Indiana (1952) 230 Ind. 358, 103 N.E. 2d 680 39

Branzburg v. Hayes, 408 U.S. 665, 713 .....9, 29

Colvin v. State, 321 N.E. 2d 565, 567 8

Consolidated Realty Co. v. Richmond Hotel and Building Co., 69 S.W.2d 985, 253 Ky. 463 34

Dalrymple v. Pittsburgh Consol. Coal Co. (W.D. Ia. 1959), 24 F.R.D. 260 27

Davidson v. New Orleans, 96 US 104, 24 L.Ed. 616 34

De Frisco v. State, 288 N.E.2d 576, 579 (Ind.) 32

Deplen County v. Ezzell, 27 S.E.2nd 448, 450, 223 N.E. 531 31

Direct Plumbing Supply Co. v. City of Dayton, 138 Ohio State 540, 38 N.E.2nd 70, 72, 137 A.L.R. 1058 33

Driver v. Hinnant (1966) U.S. 20 L.Ed.2d 1254, 88 S.Ct. 2145 .....26, 35

Ealy v. McGahen, 21 P.2nd 84, 87, 37 N.M. 246 31

Embury v. Conner, 3 NY 511, 517, 53 Am. Dec. 325 34

Gannon v. Lake Circuit Court (1945) 223 Ind. 375, 61 N.E.2d 168 39

PAGE

Haines v. Kerner (1972) 404 U.S. 519 24

Happy Coal Co. v. Bradshear, 92 S.W.2nd 23, 28, 263 Ky. 257 31

Hazel-Atlas Glass Co. v. Hartford Empire Co. (1944) 322 U.S. 238, 246, 64 S.Ct. 997, 1001 33

Joseph v. Norton Co., (2d Cir. 1959), 24 F.R.D. 72 (S.D.N.Y. 1959), aff'd 273 F.2d 65 27

Leong v. Railroad Transfer Service, (7th Cir. 1962) .. 27

Link v. Wabash Railroad (1962), 370 U.S. 626-637 25

Lynch, et al. v. Household Finance Corp., et al., (1972), 405 U.S. 538 25

Manning v. Ketcham (1932) C.A. 6th, 58 F.2d 948 39

Nebbia v. People of State of New York, 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct. 505 34

North American Co. v. Securities and Exchange Commission, C. Ca. 113 F.2d 148, 154 34

Padovani v. Bruchhausen, (2d Cir. 1961), 293 F.2d 546 27

Paige v. Wright, (1940) 116 F.2nd 449, 453 .....28, 38

Pennsylvania Publications v. Pennsylvania Public Utility Commission, 152 Penn. Super. 279, 32 A.2d 40, 49 33

People v. Skinner, Ca. 1110 P.2d 41, 45 33

Powell v. Alabama (1932) 287 U.S. 45, 59 .....8, 35

Powell v. Texas (1967) U.S. 20 L.Ed.2d 1254, 88 S.Ct. 2145 .....26, 35

Robbins v. Commonwealth, 232 Ky. 115, 22 S.W.2d 440 7

PAGE

Robinson v. California (1962) 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct. 1417 ..... 26, 35

Root Refining v. Universal Oil Products Co., (1948) 169 F.2d 514 33

Joseph E. Seagram & Sons v. Board of Comm'rs, Etc., (1943) 220 Ind. 604, 45 N.E.2d 491 39

Stanton v. State of Indiana (1952) 231 Ind. 223, 108 N.E.2d 251 39

State v. Hillis, 124 N.E. 515, 516, 79 Ind. App. 599 34

State v. Rossi, 71 R.I. 284, 43 A.2d 323, 326 33

State ex rel. Allen v. Vermillion Circuit Court (1967) 248 Ind. 258, 226 N.E.2d 324 39

State ex rel Ashbaugh v. Circuit Court of Eau Claire County (1897) 97 Wis. 1, 72 N.W. 193, 38 L.R.A. 554 39

State ex rel Stanton v. Murray, Judge; Stanton v. State of Indiana, (1952) 231 Ind. 223, 108 N.E.2d 251 39

State ex rel Suprise v. Porter Circuit Court (1948), 226 Ind. 375, 80 N.E.2d 107, 381 31

Stoner v. Higginson, 316 Pa., 481, 175 A. 527, 531 33

Syracuse Broadcasting Corp. v. Newhouse, (2d Cir. 1959), 271 F.2d 910 27

Town of Walkerton v. N.Y.C. & St. L.R.P. Co. (1939) 215 Ind. 206, 214; 18 N.E.2d 799, 803 39

U. S. v. Knight, (1971), 443 F.2d 174 35

Warren v. Indiana Telephone Co. (1940) 217 Ind. 93, 26 N.E.2d 399 39

Ziegler v. Railroad Co., 58 Ala. 599 34

PAGE

Constitutional Authorities

Amendments I, V, VI, VIII and XIV of the United States Constitution 2, 26, 28, 35

Statutory Authorities

42 U.S.C. 1983 2

42 U.S.C. 1985 2

42 U.S.C. 1986 2

Indiana Trial Rule 5(E)(2) 6

Indiana Trial Rule 6(E) 40

Indiana Trial Rule 58 ..... 23, 30

Indiana Trial Rule 31(b)(4) 23

Indiana Trial Rule 30 and 32 ..... —

Indiana Trial Rule 26(c)(3) 12

Indiana Trial Rule 59 and 60 36

Indiana Trial Rules 15(M)(6) & 15 (J) 39

Indiana Trial Rule 72(c) 36

Indiana Trial Rule 76(8) 6, 14

Indiana Trial Rule 55(A) 36

Other Authorities

5 I.L.E. 491, Chapter 11, DUE PROCESS OF LAW, § 201 28

24 CJS CRIMINAL LAW, Para. 1628, page 950 39

In the Supreme Court of the United States

OCTOBER TERM, 1979

NO.

MARGARET Y. JUSTAK,

Petitioner,

VS.

A. A. BOCHNOWSKI, JOHN D. COCHRAN, KARL J. STIPHER, STEPHEN A. CLAFFEY, CHARLES E. SCHALLIOL, WILLIAM F. SATTERLEE, III, WALTER SCHRAGE, and FIRST BANK OF WHITING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

OPINIONS BELOW

1. On April 8, 1977, the Trial Court dismissed this action with prejudice, as sanctions for refusing to give deposition answers after having heart failure during the deposition. Affidavits supporting this are in the Appendix as is the Order of dismissal.

On July 23, 1979, the Indiana Court of Appeals affirmed the dismissal; and on August 29, 1979, it refused a rehearing.

On December 13, 1979, the Supreme Court of Indiana dismissed the Petition to Transfer to the Supreme Court.

On April 3, 1980, the United States Supreme Court granted petitioner an extension of time for filing her Petition for Certiorari to May 11th.

JURISDICTION

The United States Supreme Court has jurisdiction under Supreme Court Rule 21 and related federal statutory and constitutional provisions of 42 USC 1983, 1985 and 1986 including the Due Process Clause of Amendment V and XIV of the United States Constitution. The Writ of Certiorari should be granted, because constitutional issues are involved, including denial of a fair trial, of a jury trial.

Petitioner Pro-Se has been deprived of Due Process by being forced to discovery with such swiftness under the circumstances, as to be per se a denial of due process.

QUESTIONS PRESENTED

I. Whether the Trial Court's dismissal with prejudice for plaintiff's failure to complete a deposition after a heart attack during the deposition, while accompanied by a nurse as a cancer patient, and contrary to doctor's orders, was the enforcement of such swiftness of the judicial process as to constitute a per se denial of due process;

II. Whether the Court of Appeals of Indiana erred by ruling that the trial-court procedure, denying due process rights, was merely the proper exercise of judicial discretion.

III. Whether the Trial Court erred in vacating the Petitioner's default judgment;

IV. Whether petitioner was denied due process with respect to her rights of appeal;

V. Whether the Indiana Supreme Court erred in finding that petitioner had failed to comply with time require-

ments in filing her petition for leave to transfer her case from the Court of Appeals to the State Supreme Court.

STATEMENT OF THE CASE

This is a legal malpractice and civil rights case, pro se, stemming from a probate proceeding starting in 1972 but still pending. The Petitioner is the executrix, in the other case, of the estate of her late husband, who had been half-owner of a large trucking company. The probate matter had been before Judge Alfred J. Pivarnik, who has since been appointed to the Indiana Supreme Court by Governor Otis T. Bowen despite massive protests by citizens and the pendency of a formal complaint against him before the Judicial Qualifications Commission and during the pendency of multiple federal suits in Hammond, Indiana for illegal acts from the bench. On May 11, 1977 Judge Pivarnik was sworn in as a Justice of the High Court. The Supreme Court of Indiana, by Constitution and Statute, has supervisory jurisdiction over the Court of Appeals of Indiana and the Judges thereof, including the Trial Judges who participated in the present proceedings and the companion appeal which the Court of Appeals decided on despite the fact that it was filed nearly 19 months earlier.

The instant malpractice—civil rights case was before Judge Harold Staffeldt. The respondents include six attorneys, several of whom together with their law partners are, as a result of a criminal probe initiated in September 1979, being sued in civil and criminal proceedings for malpractice in twelve (12) other probate matters. One partner has pleaded guilty to three felony counts and is imprisoned. The other died as a result of a suicide attempt. The latter was ex president of the State Bar Association. (See appendix 9, p. App. 40) Judge Staffeldt was added as a defendant in the amended complaint. The petitioner's contention has been that the respondents entered into her

probate case as trespassers—interlopers—without her consent, request, or approval; they filed numerous motions and other pleadings, purported by them to have been filed in her behalf. The effect of such legal papers was to defraud her of her rights in the multi-million dollar trucking firm.

The Complaint, filed September 5, 1975, charges defendants with fraud and participation therein by a common scheme; malpractice by the attorneys named; and placing fraudulent documents into the Court Record. Each defendant was properly served; and all answered except A. A. Bochnowski, who made no attempt to answer until nearly four months after service. Plaintiff also charged them with illegally distributing funds exceeding $140,000 from an escrow account held by defendant First Bank of Whiting. Judicial notice is requested of the fact that on Wednesday, February 1, 1978 the Hammond Times reported that the Director, Peter J. Vukovich, of the First Bank of Whiting had resigned after the Bank discovered more than $200,000.00 in losses and that he was now the subject of investigations, as was the Bank, by both the F.B.I. and the I.R.S. The paper also reported that this loss was tied to a $3.5 million dollar check-kiting scheme involving several other banks and that the Federal Deposit Insurance Corporation was conducting a separate investigation into the entire matter. The Complaint was amended on December 14, 1976 to include as Defendants the presiding Judge in this cause of action, Harold R. Staffeldt, and Judge Michael S. Kanne, charging a violation of civil rights under "color of law."

Petitioner, acting pro se, filed numerous motions including demand for change of venue to another county or to another judge, together with her unopposed affidavit stating that her case should not be before Judge Staffeldt, because he was biased against her and hostile toward her.

In the probate case, involving petitioner's husband's 50 percent partnership interest in the trucking firm, Judge Pivarnik ruled notwithstanding (1) partnership agreement provisions (2) provisions of the Uniform Partnership Act and (3) statutory probate law in Indiana and elsewhere, that the provisions of the will took preference over each of the above wherever they were in conflict one with the other. The Partnership agreement provided that wills of the brothers were to be subordinated to the partnership agreement. There had originally been five brothers; three had predeceased petitioner's husband, and their wills had been probated according to the provisions of the partnership agreement. In petitioner's probate case, Judge Pivarnik had ordered a hearing on a motion for summary judgment at the time, as the judge knew that petitioner was going into the hospital. Petitioner has cancer and, in 1975, was not expected to live beyond 1977. She had had surgery, removing both breasts and internal organs. That judge had, a few weeks prior, dismissed these six trespassing attorneys; and petitioner filed the instant malpractice case against them.

In this cause of action, the Defendants acquired an exparte Venue Order and removed this cause of action away from Judge John Baron who was most eminently qualified to resolve the issues raised herein. After acquiring a Default Judgment against one of the Defendants in this case, A. A. Bochnowski, Plaintiff learned from a trusted source who had proved reliable in the past that her cause of action had been "fixed"; that her default and default judgment lawfully acquired would be unlawfully voided by unilateral action of the Trial Judge who was responding to pressures from members of the Bar Association; that the frauds complained of would never be resolved by any STATE COURT JUDGE sympathetic to either Circuit Court Judge Alfred J. Pivarnik or Karl J. Stipher. On January 20, 1976, Margaret Y. Justak by proper Verified Mo-

tion for Change of Venue conveyed this information to the Trial Court by filing under Trial Rule 5(E)(2), said Motion, meeting each and every specification as required by Trial Rule 76(8) and included within the Motion specific citations of controlling law showing that the Trial Judge had lost Jurisdiction on the filing thereof as a matter of law.

During the course of this action, and after absolute failure and refusal to divest himself of Jurisdiction in this cause of action, the Plaintiff-Appellant moved against the Trial Judge to the Indiana Supreme Court within the provisions of Rules 53.1(A) and (B) which provides the alleged assurance to the Petitioner that whenever a Judge refuses to rule upon a Motion tendered for a period in excess of thirty (30) days, that said Petitioner will have a new Special Judge appointed by said Indiana Supreme Court. In this cause of action, and despite the damning evidence placed before the Indiana Supreme Court, said High Tribunal refused to replace the errant Judge and ruled that his failure to rule on a Motion for a period in excess of eight (8) months was not in their "interpretation" a violation of the thirty (30) day mandatory rule.

Margaret Y. Justak, being thus rebuffed and finding that the Trial Judge would not set oral argument on her Motion for Sanctions against the Defendants for their barbaric behavior which resulted in heart failure on her part, proceeded to file a number of motions before the Trial Judge and on December 14, 1976 attempted to file a new and an original action specifically describing how the various Trial Judges who had presided over this Cause had violated her civil rights under the "color of law" and fully expected that at this point the presiding Judge would finally relent and respect the laws and the rules he is obliged to observe by reason of his oath and would permit a new and impartial Judge to handle the balance of the

case. The record shows that nothing would stop the Trial Judge, Harold R. Staffeldt, and on the day following, in violation of all law, the record shows that he summarily disposed on December 15, 1976 of all pending Motions before him PRIOR TO RULING ON THE PETITION FOR LEAVE TO FILE THE NEW ORIGINAL ACTION IN WHICH HE HAD PROPERLY BEEN SERVED BY SUMMONS PLACING HIM IN A DIRECT CONFLICT OF INTEREST POSITION. The Trial Judge's actions on that date included the dismissal of the action without stating a cause therefor and an interpretation that passing into unconsciousness during a deposition was an actual willful and constructive violation of the Court's Order to give a deposition. It is from this ludicrous and abhorrent Order and final Judgment which was reduced to writing in April of 1977 that appellant seeks relief (Appendix 1, App. p. 1).

Two separate appeals were placed before the Indiana Court of Appeals arising out of the same facts and issues. The first was filed 19 months earlier than the instant appeal (October 7, 1976 vs. May 8, 1978). The former had been decided by Judge (now Justice) Pivarnik whose acts on the bench are, petitioner believes, equivalent to those of the judge who was imprisoned in *Robbins* v. *Commonwealth*, 232 Ky. 115, 22 S.W.2d 440.

The Court of Appeals on July 23, 1979 decided the instant appeal adversely to petitioner and without ruling on the companion appeal. As a consequence, she had property taken from her in excess of one million dollars in value. Her timely request for rehearing was denied on August 29, 1979.

The Indiana Supreme Court has refused to review the appellate opinion, incorrectly holding that the Petition to Transfer the case from the Court of Appeals had been filed one day too late.

REASONS FOR GRANTING WRIT OF CERTIORARI

I.

THE TRIAL COURT'S DISMISSAL WITH PREJUDICE FOR PLAINTIFF'S FAILURE TO COMPLETE A DEPOSITION AFTER A HEART ATTACK DURING THE DEPOSITION, WHILE ACCOMPANIED BY A NURSE AS A CANCER PATIENT, AND CONTRARY TO DOCTOR'S ORDERS, WAS THE ENFORCEMENT OF SUCH SWIFTNESS OF THE JUDICIAL PROCESS AS TO CONSTITUTE A PER SE DENIAL OF DUE PROCESS.

"We are aware of no authority for the proposition that the swiftness of the judicial process may constitute a per se denial of due process," the Indiana Supreme Court observed in *Colvin* v. *State,* 321 N.E.2d 565, 567. The same court then quoted the United States Supreme Court in *Powell* v. *Alabama* (1932), 287 U.S. 45, 59, where the Court said: "* * * The prompt disposition of criminal cases is to be commended and encouraged."

The instant case is the prime example the Supreme Court needs to hold "that the swiftness of the judicial process, including discovery in a civil case, *can* constitute a per se denial of due process."

Although the "prompt disposition of *criminal* cases is to be commended and encouraged", at least in those cases where the defendant is incarcerated awaiting trial while being presumed innocent, and where the defendant has not caused the delays, no such proposition applies to a *civil* case where it is the plaintiff who is being *deprived of due process* through the physical impossibility of her comply-

ing with discovery with the swiftness demanded by the defendants and the Court.

As Justice Douglas expounded in his Opinion in *Branzburg* v. *Hayes*, 408 U.S. 665, 713,

> "For the understanding of these principles it is essential to keep clear the crucial difference between 'the rights' of the governed and 'the powers' of the governors. And at this point, the title 'Bill of Rights' is lamentably inaccurate as a designation of the first ten amendments. They are not a 'Bill of Rights' but a 'Bill of Powers and Rights.' The Second through the Ninth Amendments limit the powers of the subordinate agencies in order that due regard shall be paid to the private 'rights of the governed.' The First and Tenth Amendments protect the governing 'powers' of the people from abridgement by the agencies which are established as their servants. In the field of our 'rights,' each one of us can claim 'due process of law.' In the field of our governing 'powers,' the notion of 'due process' is irrelevant. . . .
>
> "Two principles which follow from this understanding of the First Amendment are at stake here. One is that the people, the ultimate governors, must have absolute freedom of, and therefore privacy of, their individual opinions and beliefs regardless of how suspect or strange they may appear to others. Ancillary to that principle is the conclusion that an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs."

The "rights of the governed" including petitioner Justak include her "absolute freedom of . . . (her) individual opinions and beliefs" such as her belief that other non-lawyers can help her plan and execute her own lawsuit without counsel by a licensed attorney. (R)egardless of how suspect or strange (this) may appear to the defend-

ants-respondents herein, being themselves attorneys, she "must also have absolute privacy over whatever information (she) may generate in the course of testing (her) opinions and beliefs." This means that she need not divulge the names, addresses, and experience of individuals helping her with this litigation, as was demanded at her deposition.

One of the strategies of the respondent-attorneys in the instant, legal malpractice case was to destroy Margaret Justak, Petitioner herein, through excessive, unjustifiable discovery procedures. After having scheduled and cancelled her deposition several times, and after she had submitted proof to the judge that she was ill with cancer, the judge ordered that she be well at the time she appeared for the deposition and that she not be on any medication, regardless of her doctor's orders to the contrary. He further ruled that, if she did not show up, and did not give her deposition under those conditions, the judge would dismiss her lawsuit. She was also ordered that, if she was going to be sick and therefore not be able to submit to deposition on a given day, she was to give at least 24-hours' notice, which is impossible to predict with her condition. Failure to give such notice would also cause dismissal. On one occasion she appeared, but opposing counsel cancelled the deposition because she admitted that she was on valium.

Contrary to petitioner's aforesaid "Powers and Rights" as enunciated by the late Justice Douglas, the third time she appeared for her deposition, she was harangued for the first three hours with irrelevant questions like who did her typing, since she was pro se; and deponent kept objecting as to the lack of relevancy. She protested that he was making her sick, but he wouldn't stop. She had a nurse present, and the nurse submitted a 4-page Affidavit as to what happened. (Appendix 7, App. p. 27) Only in the last 45 minutes of the 4½-hour deposition was she

asked relevant questions, by which point deponent Justak had heart failure, passed out, and was bleeding from the mouth.

Beginning with the Plaintiff's Motion filed on September 23, 1975 entitled "Notice and Demand" together with attachments, the Plaintiff did, under penalties of perjury, place the Court on notice that she was a victim of cancer and did so in the aforementioned document in the following words:

> "... Margaret Y. Justak has a medical appointment, entered into some months ago, for all-day medical tests on September 5, 1975. Attached hereto and made a part hereof as Exhibit 'A' are hospital and doctor's notations relating to the same. She has already been operated on for cancer and the doctors have *spotted a new growth.* That she will not know the results ... for some fourteen days thereafter, during which time she will be under doctor's supervision on a day to day basis and probably have drugs administered to her including *cobalt treatment.*" (Tr. pgs. 26a, par #5).

Again in January 1976, the Plaintiff placed the Court on notice regarding her cancer condition by the filing of her "Emergency Motion for Postponement of the Deposition of Margaret Y. Justak", the pertinent portion of which is as follows:

> "That an emergency exists in that Margaret Y. Justak is ill and was so stricken on January 28, 1976 and treated at Holy Cross Hospital for diarrhea, vomiting, and severe abdominal pain requiring confinement and medication. That the medication includes a combination of drugs that must be taken daily at periodic intervals which affect her mental acuity to a degree her answers could not be legally relied upon ... that she must return for treatment within a week and to determine if the illness has aggravated her *cancer condition.*" (Tr. 28a, para. 1, 2, and 4).

The record shows that the Court was placed on notice for the third time of both the seriousness of her "status" and the intention of the Defendants to take advantage of her cancer condition by her filing on March 16, 1976 her Verified Motion entitled "Motion for Protective Order Under T.R. 26(C) (3) limiting method of discovery allowed to Defendants" the pertinent portions of which are as follows:

> "That heretofore, the Defendants have caused an Order to issue in this cause of action compelling the attendance of the Plaintiff for an unrestricted period of time and by an unrestricted number of persons for the *alleged purpose* of taking her deposition. By reason of hospitalization and illness and the filing of an emergency motion by the Plaintiff during perfection of the Change of Venue, this deposition was never realized. That the Defendants and each of them *are fully aware* that the Plaintiff is now and has been a victim of cancer since 1971; necessitating hospitalization and operations; and resulting in a predisposed and precarious position of alternating health *over which Plaintiff has no control.* The condition can be severely aggravated to the detriment and peril of the Plaintiff by continuous periods of pressure or adverse interrogations such as is possible during depositions. The bulk of the issues raised by Plaintiff's Complaint are essentially matters already a part of other Court record and/or documents in the possession or ready access of the Defendants. Discovery by deposition is unwarranted and objectionable to the Plaintiff by reason of the undue burden and risk placed upon the Plaintiff and is an oppressive demand by the Defendants to *harass and annoy the Plaintiff.*" (Tr. pgs 100-101, para. 1, 2, 4).

The Defendants seeking to challenge the motion for protective order were granted a hearing scheduling the same for argument on April 26, 1976 (Tr. 103). The Plaintiff responded with a "Notice of Intent" motion showing she could not attend because:

> "That on April 24, 1976 this Plaintiff took ill and so notified this Court and the parties affected on said date by telephone through her daughter-in-law. That this state of illness has continued and with sufficient severity that Plaintiff has been scheduled by her physician *for a full day of cancer tests* on May 6, 1976. That on the basis of experience with these types of tests since 1971, Plaintiff will not be in either physical or emotional condition to undergo the pressures of Open Court hearing or other stress situations until at least May 14, 1976." (Tr. 134-5, para. 2, 3, and 4). Said Motion further fully advised the Court that it had lost jurisdiction by operation of law and was prohibited by Statute (Indiana Trial Rule 76) from proceeding any further. (Tr. 134, para. 1).

The record shows that notwithstanding proper notice by telephone and verification by motion as to why Plaintiff could not appear, the Court proceeded to hold ex-parte hearings on the 26th day of April denying the protective Order; ordering that the deposition take place on June 3, 1976 and then proceeded to threaten dismissal of the action should Plaintiff not appear and sua-sponte overruled and denied the motions of Plaintiff not set for hearing and despite the fact that it had nothing from the Defendants to so rule that did or could have contradicted or refuted the statements of the Plaintiff. The record shows that the Plaintiff did both by a timely and proper filing and by serving of her motion entitled "Motion to Vacate Order of April 26, 1976" completely and adequately presented to the Court its multiplicity of errors, violation of her Constitutional Rights, and exceeding the Jurisdiction given to an Indiana trial Court by the State legislature which pertinent parts of said Motion are as follows:

> "This Court purposely mislead the Plaintiff into believing no hearing was to be held on April 26, 1976 . . . that the Order is a nullity and void for each of

> the grounds stated above . . . and because the rights of the Plaintiff were so violated that this Court effectively lost jurisdiction by reason of: *Dorsey* v. *Gill* (other citations follow) (Tr. 138, 18-28) (continuing) attached to the motion was the statement of the internationally respected cancer physician which read as follows:
>
> "This will certify that Mrs. Marge Justak was treated in 1971 for breast cancer and has been under observation since then with periodic scans, x-rays, and blood tests . . . I feel that the emotional strain from prolonged questioning may adversely affect Mrs. Justak's health and would *urge you to keep deposition time as short as possible.*" (Tr. 140).

The record shows that counsel for the Defendants admitted that the Plaintiff appeared and that Defendants continued the deposition for June 3, 1976 (Tr. 360, lines 13-21). The record shows that the Trial Judge refused to disqualify himself or to permit a change of judge and on the 21st day of June, 1976 conducted a hearing. (Tr. 344). The Plaintiff repeated her challenge to the Jurisdiction of the Court, the pertinent portion of her "Open Court" statement and argument are as follows:

> "Now the Order of the 26th is void for want of jurisdiction, because the Court lost jurisdiction on my filing of Change of Venue. Now I abided by all the rules when I filed for Change of Venue. I met all the requirements in (T. R.) 76-1 and in 76-8, my Motion was verified, I specified when I discovered the grounds, I specified how I discovered the grounds, and I stated the facts for the grounds. There were no counter-affidavits filed by the opposition counsel within the ten (10) day period so the Court is under an obligation to rule on facts before it. Trial Rule 56-C says the Court *must* make decisions from affidavits and testimony. The only affidavits and testimony present before the Court were those of the Plaintiff, namely myself." (Tr. 328) . . .

(continuing) "there is another one here in *Moore* v. *Fletcher*, 'that the Court was divested of any further jurisdiction to act except to grant said motion for a change of venue from the County or the Judge', it is my understanding that each litigant is entitled to one change of venue and one change of judge." (Tr. 329, 9-12)

To all of which argument the Court responded as follows:

"I would at this particular time, relative to your motion now to vacate the Order, which I made, where I overruled your motion for change of venue and the previous motion to vacate—overruled it again." (Tr. 338, lines 14-18).

The record shows that the Plaintiff, Margaret Y. Justak, reactivated her request that the discovery proceedings be limited to interrogatories so that she might comply with the rules of procedure. The pertinent dialogue between the Court and the parties is as follows:

"Mr. Spangler (Counsel for the majority of the Defendants): Mrs. Justak, let me ask you, are you saying to the Court now, in your present state of mind, that you are unable to proceed with the deposition, is that what you are saying?" (Tr. 339, lines 21-24).

"Mrs. Justak: It all depends because I cannot say that on the day that you scheduled me. Unless you are familiar with the illness of cancer, if you are that fortunate that you don't have anybody in your family that has it, you don't understand what I am speaking about because you have your good days and your bad days and *you never know in advance when you are going to have the day, you're just going to feel ill.* . . . Why is the constant harassment about the deposition continuing, I would answer the questions if you would give the interrogatories, they would still be under oath, but I could do them in my own time? I would not have the harassment

> or the pressure. I mean in three (3) separate motions I have filed my illness, three (3) separate motions stating the severity of it. For some reason or other it doesn't seem to penetrate." (Tr. 339, Lines 25-38; 341, lines 1-3 and 27-28; 371, lines 1-4).

The record shows that the Plaintiff's plea could not sway the Court and that the Court insisted that only the appearance of the Plaintiff's physician, being sworn under oath, and subject to cross-examination would convince the Court that the Plaintiff was telling the truth of her cancer condition. The pertinent statement of the Court is as follows:

> "There is nothing under oath, there is no opportunity for cross-examination, the whole structure and the system of the legal system of the Country that you can meet your adversaries, get your people together and examine and cross examine." (Tr. 341, lines 15-19).

It is incredible that any judge would consider a litigant's personal physician, not a party to the suit, to be an adversary. It is equally inexplicable why a judge should doubt the veracity of affidavits stating the plaintiff suffered from cancer, especially where there are no counteraffidavits or any other reason to disbelieve her statement. Is it a self-serving statement to admit one has cancer?

To the judge's audacious refusal to allow for her severe illness she responded,

> "You say 10 o'clock and I'll be there even if on a stretcher. But don't be surprised if that's the condition they bring me in. I am telling this Court in advance I have cancer. I have had it since 1971, I don't deny that fact. *If you want to continue to harass me with this deposition, be my guest.*" (Tr. 343, lines 15-20).

The record shows that the Court intended to permit the continuation of the harassment and scheduled the deposition for July 19, 1976 at 10 o'clock A.M. (Tr. 343, lines 21-23). The Order of the Court released the day of June 21, 1976 had the threat of dismissal should the Plaintiff fail to appear both physically and mentally able to take her deposition. This admonition is stressed at three (3) separate places within the Court's Order, the specific words are as follows:

> ". . . and in the event Plaintiff is unable to proceed with the depositions, the Court shall suspend all action and dismiss this action until said Plaintiff is *able to pursue and comply with said rules.*" (Tr. 131, lines 19-22).

The record shows a monstrous and barbaric attack upon the Plaintiff when she appeared for the deposition as fully disclosed in the Verified Motion for Sanctions filed by the Plaintiff on September 3, 1976. The pertinent portion is as follows:

> "That the Plaintiff did appear as ordered and endured for nearly four (4) hours an abusive assault made wholly in bad faith which did injure the Plaintiff and *caused her to have a heart failure and was left unconscious* upon the floor as is verified by the affidavits attached hereto . . ." (Tr. 152) . . . "that for 2½ hours the Plaintiff was exposed to a line of questioning *repeatedly objected to as irrelevant* to the pleadings and *forbidden by the First and Fourteenth Amendments* to the U. S. Constitution as well as by settled Indiana case law which Plaintiff quoted as part and parcel of her objections at the alleged deposition". (Tr. 152).

The record shows that the verified Motion for Sanctions by the Plaintiff was supported by an affidavit of a nurse who under oath stated that she had in excess of fifteen (15) years of experience and details within her four (4) page

affidavit submitted as an Exhibit to the Motion for Sanctions the specific brutality and effect, hour by hour, upon the Plaintiff and the grilling by Mr. Spangler until her utter and total collapse. (Tr. 156-160). The seriousness of the damage done to this litigant whose pleadings and affidavits made under oath, but wholly ignored by the Court is made more vivid by the second affidavit attached, that being the affidavit of her personal *physician, Dr. John E. Roche,* whose *affidavit* in pertinent part is quoted as follows and appears *in toto* at Appendix 7:

> ". . . on the evening of July 21, 1976 I attended Mrs. Justak for treatment of paroxysmal tachycardia and conjestive heart failure . . . this patient was brought to my office and upon examination was found to have a pulse of over 140 per minute; mild dyspnea and edema of the lower extremities, blood pressure was 160/90 . . . treatment consisted of intramuscular injection of digitalis and lasix. Patient was advised to take digitalis daily by mouth and continue with the valium as previously prescribed and lasix by mouth every day and to rest at home . . . that I again attended the above patient on August 13, 1976 and after re-examination ordered her to continue the above prescription . . ." (Tr. 161).

The significant fact of record is made that the Court held the life of one litigant as being less valuable than the right of another litigant to conduct discovery.

On December 14, 1976, the Plaintiff filed an Amended Complaint naming the sitting Trial Judge as a Defendant as well as the prior sitting Judge each of whom were properly served with summons. (Tr. 221-225). At the hearing, the Record shows that the Court summarily denied each, every, and all motions and arguments tendered by the Plaintiff and ordered the Defendant's Motion to Dismiss be granted. This, despite the fact of record shown as follows:

(1) On Plaintiff's argument that she had never been provided with a deposition transcript and needed same to compare to the quotes utilized within the Defendant's Motion to Dismiss, the record shows the following:

> "Mrs. Justak . . . How can I argue something if I don't have a copy of the transcript in front of me . . . I should have a copy so that I can approve it and that I may sign it and that I may see if anything has been deleted or added to it . . . as it is I have no idea of what that transcript contains so I cannot argue something and according to law *both* parties must have the particular motion in front of them that they are going to argue . . . I cannot argue something that I have no access to. (Tr. 346, lines 1-18).

(2) On the Plaintiff's argument of lack of notice the record shows the following:

> ". . . I received my document from this Court, your Order, on Monday. There is no way from Monday to today (a Wednesday) that I could have prepared to come in here and *argue nine* (9) *separate motions* and without even being able to have witnesses or preparing witnesses, or even letting the witnesses know . . ."

(3) On the Plaintiff's argument pertaining to her Motion to Strike which had been unruled upon since March of 1976:

> ". . . I want to argue the Motion to Strike, but I have witnesses, I have two that I must bring into Court. Now if you set another day I will make sure that these witnesses are here in Court . . ."

(4) On the Plaintiff's argument that she has a right to put the Defendant Bochnowski on the stand to testify regarding his knowledge of fraud pertaining to the Motion to Strike, the record shows as follows:

> "But I do have the evidence. This is what I am trying to tell you, Judge, I have the evidence if you will put Mr. Bochnowski on the stand and when the witnesses will come in, they will attest to the evidence. But I must be able to have my day in Court and be able at least to bring up the matter of the evidence that I will introduce."

(5) On the matter of the Plaintiff's Motion for Continuance the record shows the Court's response as follows:

> "If you are asking for a continuance I would say that has already been settled by the setting today and if you are now asking for a continuance I would deny that." (Tr. 353, Lines 5-7).

(6) On Plaintiff's Motion for Defendant's Counsel to provide an affidavit to sustain his Motion to Dismiss the record shows as follows:

> ". . . I would like to make a motion for you, Judge, to ask Mr. Spangler to provide this Court with an affidavit." To which the Court responded: (Tr. 353, lines 27-28).
>
> "Well on this Motion the Court would overrule the Motion. That would be the decision of the Court at this time." (Tr. 354, lines 14-16).

(7) On the Plaintiff's Motion for Sanctions, the record shows the argument as follows:

> "Discovery is suppose to be limited to those issues that are relevant to the Complaint. This is what the law says. Well then my deposition, the questions that were asked for the first two hours were not relevant to the Complaint and they just hammered and hammered and hammered knowing that I did not feel well or questions that were not going to possibly help them whatsoever to win the case for the

> Defendant. Mr. Spangler just asked irrelevant questions as the transcript of the deposition will show. At the time he got around to asking questions that were pertinent to the Complaint, which was somewhere around give or take a little after 12:00 or 12:30, I had to take the medication and once I went under the medication anything I said became void. So the entire transcript of the deposition is void from the minute I started it to the very last sentence." (Tr. 356).

To all of which the Court responded and concluded the hearings of that date as follows:

> ". . . I would, at this time, sustain the Defendant's Motion to Dismiss and will so dismiss with prejudice and as I had indicated before, overrule any other pending motions that may be before the Court to include the last one, which was filed yesterday, which is a motion for leave to file an additional paragraph of the Complaint. I would also overrule that Motion . . . I would therefore overrule that one. That concludes the case." (Tr. 363, lines 2-15).

The record shows that the above transcript contains the entire proceedings, without argument, which summarily disposed of the Plaintiff's new cause of action filed with the Court on December 14, 1976 entitled, "Amended Complaint" which by law and by the Petition attached thereto, the Court was timely and properly informed that the Trial Judge *could not rule on the Motion,* (Tr. 221-222). The pertinent portions that were before the Court are as follows:

> "Because of the nature of this petition, Plaintiff moves that Harold R. Staffeldt (presiding Judge) not rule upon this Motion as he is one of the parties joined in this Complaint . . ." (Tr. 222) (Continuing)

That Judge Staffeldt

> "In conspiracy with the Defendants, did and has scheduled a purported hearing on December 15, 1976 under the color of law, but which true purpose is to unlawfully dismiss the suit of the Plaintiff, cause her further harassment and anguish and possible injury, and to deny a jury the right to adjudicate her cause of action, all of which is contrary to law." (Tr. 224) (Continuing)

That Judge Staffeldt

> "In conspiracy with the Defendants and to further the wrongful acts complained of against the Plaintiff, did in violation of law compel her appearance (for deposition) knowing that its purpose was to injure, harass, and damage the Plaintiff and did in fact cause injury, damage, and anguish on July 19, 1976 resulting in heart failure to the Plaintiff, all the while denying protective orders which as of right ought to have been granted as a matter of law." (Tr. 224).

The record is totally barren of any response to these verified allegations that could in any way be interpreted as a denial. By operation of law they are evidence of admission. The record shows that the cause was ordered dismissed with prejudice on a summary basis by a judge without lawful authority. The record shows that no motion to deny the Plaintiff's Amended Complaint was ever filed or tendered before the court. The record shows that *contrary to law* the trial judge disposed of all pending motions *before ruling on* the petition for amended complaint which *challenged the jurisdiction of the court.* The record shows that there was no final judgment issued as of February 1, 1977. The record shows that the court entered a "memorandum" stating:

". . . THE MATTER IS *CONTINUED PENDING* THE PREPARATION OF FINDINGS AND THE PREPARATION OF AN *ENTRY OF JUDGMENT*" (Tr. 228)

On January 17, 1977, the Record shows that the Plaintiff filed and served her Motion entitled, "Motion of Margaret Y. Justak To Vacate, Set Aside, and Expunge from the Record the Several Orders of January 15, 1977 With Memorandum in Support" (By typographical error the typist continued throughout the motion to type the month as being January when in fact it was understood by all parties that the Motion was directed to the December 15, 1977 hearing hereinabove and before described and quoted from). (Tr. 230-234). The record further shows that the Court set this Motion on January 21, 1977 for a specific hearing to be had on February 10, 1977 at 9:30 o'clock a.m. (Tr. 290)

On April 8, 1977, a purported hearing took place (exparte of course) (Tr. 365-367) at which time the record shows the Trial Judge docilely and blindly agreed to sign anything that opposition counsel placed before him, including the Final Judgment of Dismissal FORBIDDEN by Trial Rule 58.

A mockery of a hearing was held on August 5, 1977, purportedly to hear argument on the Motion to Correct Errors. It was, the Record shows (Tr. 368-386), another sham proceeding in which all facts, laws, and motions were summarily overruled.

Both the Trial Rule 37(B)(4) and a body of Court rulings including those of the United States Supreme Court had been violated by the dismissal with prejudice Order and Judgment of April 8, 1977 for there is and was no evidence at any time that there was any act whatsoever

on the part of the Plaintiff that was made either willfully or in "bad faith" or within her ability to comply that in any way could have threatened or delayed the rights of the opposing parties that "no other relief would be adequate". The record makes a repeated showing on the part of the Plaintiff, by undisputed and verified motions and hospital documents and affidavits from doctors and nurses, that she is and has been a victim of cancer since 1971 and is wholly incapable as a human being of controlling her physical well-being from one day to another. On the contrary, the Record shows, and is supported by the affidavits of a nurse and doctor, that on July 19, 1976, her deposition was ended by her being rendered unconscious and left there by the Defendants and their Counsel who would have allowed her to expire there would it not have been for the aid and assistance of the United States Marshall who assisted her back to her chair. This act and prior acts that may have delayed the taking of the deposition can in no way be construed by any intelligent or honest or impartial human being as an act willfully done in "bad faith" that would obstruct the rights of the opposition so as to require the punishment of dismissal of the entire cause of action. Plaintiff by the record shows that *she complied fully with the Order* of the Court to render a deposition *to the point of nearly losing her life.* Further, as an additional bar to dismissal of her suit, the Petitioner had proven to the Court that she had at least one fact within her Complaint that could be proved beyond a reasonable doubt in that the I.R.S. itself had determined that the defendants had wrongfully and willfully overstated her taxes by $60,503.43. This sole fact makes the ruling of Court a direct violation of the U.S. Supreme Court mandate of *Haines* v. *Kerner* (1972) 404 U.S. 519.

This money was her property and the United States Supreme Court has additionally ruled that the wrongful taking of another's property was a violation of civil rights in *Lynch, et al.* v. *Household Finance Corp., et al.* (1972), 405 U.S. 538.

Indiana Rule of Civil Procedure #37 is almost identical to Federal Rules of Civil Procedure #37. They cover the proper disposition of cases when a party, through some overt and controllable act, fails to comply with discovery, usually by reason of disobedience to a court order, and details the sanctions permitted, the ultimate sanction being dismissal with prejudice, a very drastic measure indeed. This was clearly stated by Justice Black in *Ling* v. *Wabash Railroad* (1962), 370 U.S. 626-637:

> "The Order now affirmed has inflicted a serious injury upon an injured man and his family, who are innocent of any wrong doing. Plaintiff's cause of action . . . was his property. It has been destroyed. The District Court . . . has confiscated another's property without due process of law, which offends the Constitution . . . and there is no justification, moral or legal for its punishment of an innocent litigant . . ."

The record shows that Margaret Justak's property was destroyed although she had committed no act whatsoever that could have been construed by any reasonable or impartial jurist as being a refusal to obey an Order or by delaying the proceedings when in fact the record shows, as this Honorable Tribunal can well see, that she complied with the Court Order to the point of falling unconscious upon a floor and being deserted there by the vexatious actions of the Defendants and their Counsel during the conduct of the hearing held on July 19, 1976. All reason and judgment of a sane person would

conclude from the record tendered to the Ind. Ct. of Appeals that the party against whom sanctions should have been directed were the Defendants and their Counsel of record for the venal and vituperous abuse of the discovery process. The record shows that the Petitioner-Appellant was not fortunate enough to be pleading her case before an enlightened Jurist, and that the Courts have uniformly distinguished between "status" and "conduct" of a party-litigant in determining whether or not a punishment should be exerted. The cases of *Robinson* v. *California* (1962) 370 U.S. 660, 8 L.Ed. 2d 758, 82 Sup. Ct. 1417; *Driver* v. *Hinnant* (1966) U.S.C.A., D.C. 361 F. 2nd 50; and *Powell* v. *Texas* (1967) U.S. 20 L. Ed. 2d 1254, 88 Sup. Ct. 2145, in each of the cases cited hereinabove the Court uniformly determined that chronic alcoholics and drug addicts could not be held responsible for their conduct because of their "status" and in fact was an application of "cruel and unusual punishment" under the 8th Amendment. Margaret Y. Justak conclusively establishes as the record shows to this Honorable Tribunal, that she is a victim of cancer over which she has no control. She has convincingly demonstrated by affidavit of both nurses and doctors, by documentation tendered by photocopies of the hospital records scheduling x-rays and bone scans and cobalt treatments, that she has a "status" over which she has no control and should be included within the above rulings as a person who has been subjected to the "cruel and unusual punishment" prohibited by the U.S. Constitution.

By way of illustration of the injustice and unlawfulness of the action of the State Trial Court sustained by the Appellate Courts, Petitioner offers the following:

Dalrymple v. *Pittsburgh Consol. Coal Co.* (W.D. Pa. 1959), 24 F.R.D. 260; and in *Joseph* v. *Norton Co.* (2d Cir. 1959), 24 F.R.D. 72 (S.D.N.Y. 1959), aff'd 273 F.2d 65, the Courts ruled that dismissal was proper only for a willful and knowing violation of an Order or Court procedure of local rule. And in *Syracuse Broadcasting Corp.* v. *Newhouse,* (2d Cir. 1959), 271 F. 2d 910, the second circuit regarded dismissal of the Plaintiff's action as "too drastic" for the Plaintiff who had clearly and willfully refused to comply with a pretrial Order to furnish factual information. Also in *Padovani* v. *Bruchhausen,* (2d Cir. 1961), 293 F.2d 546, the Second Circuit Court held improper an Order of the Federal Court from precluding a Plaintiff from entering his evidence and thus in effect dismissing the Plaintiff's claim despite the fact that the Plaintiff through his attorney had violated the Court's Order on *three separate occasions* to submit a pretrial statement. In *Bardin* v. *Mondon,* (2d Cir. 1961), 298 F.2d 235 the Appellate Court, despite the fact that the Plaintiff through his Counsel had refused to proceed with trial after three years of pendency when it reached the ready day calendar found that the *dismissal with prejudice was in error.* The Court ruled in a similar fashion in the case of *Leong* v. *Railroad Transfer Service,* (7th Cir. 1962), 302 F.2d 555 and ruled that it was an "abuse of discretion" where the trial court refused to vacate a judgment of dismissal which was rendered when no one appeared either for Defendants or Plaintiff when the case was called to trial.

The record then clearly shows that there was no act on the part of Margaret Y. Justak that could qualify as a ground for dismissal as no action or conduct on her part was in any way near the conduct shown in the above cited cases.

The transcript of the proceedings had and held on December 15, 1976 give prima-facie evidence of "fraud" and "want of" and "excess of" Jurisdiction by the Trial Judge by showing that in addition to its refusal to permit testimony from an adverse witness on a material fact, the Court failed, refused, and neglected as required by law to rule *first* on the Motion challenging its Jurisdiction on a matter involving the conduct of the Trial Judge himself. This contention of the Plaintiff-Petitioner further establishes an irregular judgment and makes said proceedings void for absence of jurisdiction, and for violation of fundamental 5th, 6th and 14th Amendment Due Process. It is fully supported not merely by the prior case law cited and the Burns Statutes cited which prohibits a Judge from ruling on matters "involving his own conduct", but is a violation of the clear mandate of law issued by the United States 7th Circuit Court of Appeals when it ruled in *Paige* v. *Wright,* (1940) 116 F.2d 449, 453, that:

> "The conclusion seems inescapable, THAT THE DUTY DEVOLVES UPON THE COURT 'at any time' THE JURISDICTIONAL QUESTION IS PRESENTED, TO PROCEED NO FURTHER until that question is determined. It cannot be conferred by agreement, consent, or collusion of the parties, whether contained in their pleadings or otherwise, and a party CANNOT BE PRECLUDED FROM RAISING THE QUESTION by any form of laches, waiver, or estoppel." (emphasis ours)

And,

5 I.L.E. 491, Chapter 11, *Due Process of Law,* § 201 provides:

> "No one may be deprived of his property without due process of law. . . . It is essential to due process of law that there shall not only be (adequate) notice of

> a time and place for a hearing, but WHAT IS MORE IMPORTANT, THERE SHALL BE A TRIBUNAL CLOTHED WITH POWER BY METHODS AND RULES PRESCRIBED BY LAW TO HEAR AND DETERMINE THE QUESTION INVOLVED, AND THE RIGHT INCLUDES . . . DETERMINATION IF A FINDING OF THE TRIAL TRIBUNAL IS SUPPORTED BY THE EVIDENCE. . . ." (emphasis mine)

The true purpose of the deposition on the part of the Defendants and their Counsel, William Spangler, is shown at Transcript page 340 from lines 12-14 at which place he states:

> ". . . we're going to deal in all of these facts as alleged in that Complaint. Who these parties are that are counseling with Mrs. Justak, and all the facts we are entitled to under the Indiana rule."

Plaintiff urges this Court to recognize that no where within the Plaintiff's Complaint is there any statement made that would permit such an inquiry as to who may or might have been counseling Mrs. Justak at any time throughout these proceedings. That the intent of the Defendants through their Counsel was clearly shown to harass and annoy Mrs. Justak and inquire into the strategy and tactics that she had utilized in opposing her opposition.

As stated by Justice Douglas in *Branzburg* v. *Hayes, supra,* "the people . . . must have absolute freedom of, and therefore privacy of, their individual opinions and beliefs regardless of how suspect or strange they may appear to others." Strangely enough, the attorneys who are defendants in this lawsuit seem to find it suspect that petitioner has a belief that she cannot obtain justice by hiring an Indiana lawyer and that, on the other hand, she is of the opinion that, by working together with like-minded citizens, who are convinced that they are "the

ultimate governors'' referred to by Justice Douglas. Her belief that she can get better legal help from non-lawyers who are self-educated in legal procedures, whether strange or not, is a part of her right under the ''Bill of Powers and Rights''—''the first ten amendments''.

Nowhere within the official Record will this Court see the actual and full exhibits tendered with the second Praecipe to the Indiana Supreme Court, such as affidavits by court-watchers including the above-named self-educated legal advisers, who testified that they had observed personally the prejudice, hostility, and collusive activity between the judge and the Defendant's counsel. By some magical osmosis and transformation these Exhibits were not deemed to be part of the record either by the Clerk or the Judge. For this reason, Plaintiff strongly urges that the Court read in its entirety the affidavit that was included within the Appendix hereto, to familiarize itself with the specific sequence of events of July 9, 1976. The record shows that the Judge was willing to sign any paper tendered by Mr. Spangler or any other member of the Bar Association as long as it was an instrument that would damage the Pro-Se layman litigant, Margaret Y. Justak.

Indiana Trial Rule 58 is an enforceable Trial Rule equal to the respect of the Courts and the Attorneys whether or not they belong to Bar Associations, as are any of the other rules which are so stringently applied to Pro-Se litigants. Within Trial Rule 58 we find the following:

> ''Attorneys shall not submit forms of Judgment except upon direction of the Court, and these directions shall not be given as a matter of course.''

There is no place in the record showing that the Court at anytime instructed Mr. Spangler to prepare the judgment or that the Plaintiff, Margaret Y. Justak, was ever noti-

fied that such Order had been given. Plaintiff urges this Tribunal to recognize the total irregularity of the proceedings that must of necessity render the Judgment void, which are including but not limited to the fact that she had not received Notice or Service of either Mr. Bochnowski's alleged Motion of October, 1975 or of several hearings set and had.

In *Happy Coal Co.* v. *Bradshear,* 92 S.W. 2d 23, 28, 263 Ky. 257 the Court ruled:

> "There are two necessary elements in any valid judgment or order of court (a) the court's decision usually evidenced by some oral statement or pronouncement and (b) enrollment or entry by the Clerk of the Court action upon the Order Book or record of the Court. The first element is judicial; the latter clerical."

This Tribunal may examine the complete proceedings as shown within the Transcript had and held on December 15, 1976 and again on April 8, 1977 and *will nowhere find either the facts proven or the decision arrived at by the Judge according to law as is shown in the paper instrument entitled Order of Dismissal* under date of April 8, 1977.

Plaintiff contends that the entire Judgment is irregular in every fashion and form and is totally contrary to the course of the Court and contrary to the method of procedure and practice allowed by law and is therefore void according to *Ealy* v. *McGahen,* 21 P. 2nd 84, 87, 37 N.M. 246 and *Deplen County* v. *Ezzell,* 27 S.E. 2nd 448, 450, 223 N.E. 531.

Summarizing the pertinent caselaw of Indiana, the appellate court stated in *State ex rel. Suprise* v. *Porter Circuit Court* (1948), 226 Ind. 375, 80 N.E.2d 107, 381:

"Whatever jurisdiction the Lake Superior Court, Room 5, had in Cause No. 54070 was invoked by the pleadings in that cause . . . if the judgment did not conform to the pleadings and findings, it may have been beyond the jurisdiction of the Court. . . . Courts generally cannot act 'sua-sponte' or on their own motion. They generally act only at the instance of one of the parties."

II.

THE COURT OF APPEALS ERRED BY RULING THAT THE TRIAL COURT PROCEDURE, DENYING DUE PROCESS RIGHTS, WAS MERELY THE EXERCISE OF JUDICIAL DISCRETION.

> " '. . . When these rights have been denied all procedural rules that would prevent their consideration or leave them to the discretion of the trial court must yield to the fundamental principles of "due process" and "due course of law." Vonderschmidt v. State (1948), 226 Ind. 439, 443, 81 N.E.2d 782, *supra;* Wilson v. State (1943), 222 Ind. 63, 78, 51 N.E.2d 848, *supra;* Todd v. State (1948), 226 Ind. 496, 508, 81 N.E.2d 530, 81 N.E.2d 784, 786, 82 N.E.2d 407, *supra.* When the constitutional requirement for "due process" or "due course of law" are denied or ignored all proceedings in the case thereafter are clearly void. Johnson v. Zerbst (1938), 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 1468; State ex rel. McManamon, et al. v. Blackford Circuit Court (1950), 229 Ind. 3, 95 N.E.2d 556, 563, and cases cited.'
>
> The judgment of the Pulaski Circuit Court under Cause Number 10-239 dated August 26, 1971 is hereby reversed with instructions to vacate the said judgment." *DeFrisco* v. *State,* 288 N.E.2d 576, 579 (Indiana).

The Higher Courts have consistently ruled that fraud may not be tolerated within the Judiciary as is readily seen in the ruling by the United States Third Circuit in

the case of *Root Refining* v. *Universal Oil Products Co.* (1948), 169 F. 2nd 514 in which the Court ruled, "A fraud on the Courts can be attacked at any time." Further, the United States Supreme Court has ruled that Judges ". . . be not so impotent that they must always be mute and helpless victims of deception and fraud . . . (nor must they) . . . always wait upon the diligence of litigants". *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.* (1944), 322 U.S. 238, 246, 64 S. Ct. 997, 1001. Further, Appellant's Brief in Chief consisting of 78 pages was in the main verbatim excerpts from affidavits, transcripts, and pleadings of the record documenting unconscionable and continuous irregularity in judicial process and proceedings wholly incongruous and violative of the mandates of the law of the land and due process as guaranteed by the United States Constitution. The rulings of the Higher Courts are wholly in conflict with the opinion and decisions rendered by the Indiana Court of Appeals, Third District, as the following establishes:

> "Judicial process and judicial proceedings are not necessarily synonymous with due process."

Pennsylvania Publications v. *Pennsylvania Public Utility Commission,* 152 Penn. Super. 279, 32 A. 2nd 40, 49; and *Berry* v. *Hall,* 98 F. 2d 222, 68 App. Ct. D.C. 350. On the other hand the Courts have ruled that:

> "Law of the land, due course of law, and due process of the law ARE SYNONYMOUS." *People* v. *Skinner,* Ca., 1110 P. 2d 41, 45; *State* v. *Rossi,* 71 R.I. 284, 43 A. 2nd 323, 326; *Direct Plumbing Supply Co.* v. *City of Dayton,* 138 Ohio State 540, 38 N.E. 2nd 70, 72, 137 A.L.R. 1058; and *Stoner* v. *Higginson,* 316 Pa., 481, 175 A. 527, 531.
>
> "Due process of law implies the right of the person affected thereby to be present before the Tribunal

which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. IF ANY QUESTION OF FACT OR LIABILITY BE CONCLUSIVELY PRESUMED AGAINST HIM, THIS IS NOT DUE PROCESS OF LAW." *Ziegler* v. *Railroad Co.,* 58 Ala. 599.

"Due process of law, as used in the Constitution, cannot mean less than a prosecution or suit instituted and conducted according to THE PRESCRIBED FORMS AND SOLEMNITIES FOR ASCERTAINING GUILT, OR DETERMINING THE TITLE TO PROPERTY." *Embury* v. *Conner,* 3 NY 511, 517, 53 AM DEC 325; *Davidson* v. *New Orleans,* 96 U.S. 104, 24 L.Ed. 616.

"This Constitutional guarantee (due process) demands that law shall not be unreasonable, arbitrary, or capricious and that means selected shall have real and substantial relation to object." *Nebbia* v. *People of State of New York,* 54 S. Ct. 505, 291 U.S. 502, 78 L. Ed. 940; *North American Co.* v. *Securities and Exchange Commission,* C.CA. 113 F. 2nd 148, 154.

Appellant complains that the opinion and decision of the Court of Appeals was manifestly unjust and violative of the above provisions of law in that the Brief-in-Chief and record transcript quoted therein shows *repeated violation* of any semblence of due process and *repeated presumption* of *facts* and *liability* against *the Appellant* in violation of the foregoing provisions of law.

Petitioner should have been fully protected from the punishment of dismissal or judgment by the "physical impossibility rule" pursuant to *State* v. *Hillis,* 124 N.E. 515, 516, 79 Ind. App. 599 and *Consolidated Realty Co.* v. *Richmond Hotel and Building Co.,* 69 S.W. 2d 985, 253 Ky.

463 as well as *Avery* v. *Hotel Alabama,* (1940), 308 U.S. 444 and *U. S.* v. *Knight,* (1971), 443 F. 2d 174.

The opinion of Staton, J. *conclusively presumes* that the alleged grounds to support the extreme sanction of dismissal against Appellant are substantiated within the record when in fact they are not and are in fact refuted by the record.

The opinion of Staton, J. conclusively presumes conduct against Petitioner when in fact the record shows her problem is status. The mandatory rule that a person should never be punished for their status over which they have no control as was shown in the Brief-in-Chief at page 49 in the citings of *Robinson* v. *California,* (1962), 370 U.S. 660, 8 L.Ed.2d 758, 82 S. Ct. 1417; *Driver* v. *Hinnant,* (1966), U.S.C.A., D.C. 361 F. 2nd 50; and *Powell* v. *Texas,* (1967), U.S. 20 L.Ed.2d 1254, 88 S. Ct. 2145.

The opinion of Staton, J. conclusively presumes that no major irregularity in the proceedings took place prejudicial to the rights of the Appellant Justak and ignores the fact that repeated ex parte hearings took place in which motions never set for hearing were ruled upon in the absence of the Appellant and said hearings on said motions were had and held *without prior notice* to the Appellant in violation of her 14th Amendment rights. Further, that as this petition is being prepared, the record discloses that several of her motions stand unruled upon even today.

The Supreme Court reasoned in *Powell* v. *Alabama,* 287 U.S. 45, 68 (1932):

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a

legal competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law.

The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions. In *Holden* v. *Hardy,* 169 U.S. 366, 380, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, *Galpin* v. *Page,* 18 Wall. 350, 368-369, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so."

III.

THE TRIAL COURT ERRED IN VACATING THE DEFAULT JUDGMENT

On January 19, 1976, the Plaintiff filed Application under Affidavit for Entry of Default and Default Judgment against the Defendant, A. A. Bochnowski which was properly and legally granted and entered of record by the Clerk of the Court under Indiana Trial Rules 72(C) and 55(A). The Record shows that *at no time* whatsoever did A. A. Bochnowski file any motion before the Court for relief from the Entry of Default and Default Judgment as required by Indiana Trial Rules 59 and 60 and further the Record shows that on January 20, 1976 there was no mo-

tion before the Court by any of the parties requesting it to adjudicate any matter, except a motion (verified) filed by the Plaintiff on January 20, 1976 demanding a Change of Venue from the County (Tr. 77-81) and a Motion for Continuance filed on the same date (Tr. 82-83). The Motion for Change of Venue contained the following pertinent verified statements:

> "That (the trial) Judge has decided unilaterally to rescind a Default Judgment obtained by Plaintiff within the last 24 hours . . . that to formalize and create the illusion of legal process, he intends to schedule a purported hearing on short notice and not within the five days required by the Civil Rules of Procedure, so as to prevent the Plaintiff, a layman and Pro-Se litigant from having sufficient time to prepare for such a hearing." (Tr. 77, para. 1, A&B).
>
> "Plaintiff has a substantive right once cause is shown under oath to be venued to another Court." (Burns Statutes 2-1410-2-1438) (Tr. 79, lines 23-24)

The venue motion quoted extensive mandatory citings which the Trial Judge was bound to observe showing that:

> "When the application for a Change of Venue was filed . . . the trial judge before whom the cause was filed lost jurisdiction except in matters of emergency and which matters need prompt determination." (Tr. 80, lines 14-18)

IV.

PETITIONER WAS DENIED DUE PROCESS WITH RESPECT TO HER RIGHTS OF APPEAL.

The opinion and decision of the Court of Appeals, Third District, is further violative of the due process rights of the Appellant with respect to her rights to appeal. The Appeals Court seeks to slough over the multiple failures on the part of the trial judges continuing to exercise jurisdiction when by law they were divested of same. All acts

of these judges are shown by the record to be a sham and a mockery of justice which the Court of Appeals by its opinion and decision has seen fit to affirm. It is not a proper function of an Appeal Court to avoid addressing itself to the issues presented to it by referring to them as "specious" and "no need to encumber an opinion with reiteration and resolution." At page 51 Appellant Justak *properly and timely raised,* before the *trial* court and before the Court of Appeals, the controlling law of *Page* v. *Wright* (1940), 116 F. 2nd 449, 453 which controls within the 7th Circuit that a duty devolves upon any court *at any time the jurisdiction question is presented to proceed no further* until that question is determined. Each of the trial judges are shown to have violated the mandatory provision of the 7th Circuit and proceeded to rule upon and otherwise conduct proceedings while the challenges to the jurisdiction of the Court were ignored or ruled upon last as is the case shown previously in each of the venue motions and as is shown on the date that Judge Staffeldt ruled upon nine motions of the Appellant Justak and pending as is shown at line 6, page 51 of Appellant's Brief-in-Chief: *"The Court failed, refused, and neglected* as required by law *to rule first on the motion challenging its jurisdiction* on a matter involving the conduct of the trial judge himself; (Amended Complaint, naming the trial judge as defendant).

The Opinion of the Indiana Court of Appeals is further defective and prejudicial to the rights of the Petitioner in that the opinion violates Indiana Appellate Rule 9(C) which provides:

> "Matters of fact which are not apparent from the record or admitted, must be supported by affidavit."

The ruling of the Court of Appeals dismissing this appeal shows on its face that it wholly disregarded the above violation of appellate rules by the appellees and that the

Court itself disregarded its own rules, namely 15(J), stating,

> "All questions of fact to be determined by the Court on Appeal shall be tried by affidavits . . ."

and, also the provision of rule 15 (M)(6) which provides:

> ". . . due regard shall be given to the finder of fact to judge the credibility of witnesses,"

and, also the mandate of recognizing the absolute and inviolable right of Appeal of the Petitioner as covered in *Joseph E. Seagram & Sons,* supra; *Warren* v. *Indiana Telephone,* supra; *Gannon* v. *Lake Circuit Court,* supra; and *Bozovichar* v. *State of Indiana* (1952) 230 Ind. 358, 103 N.E. 2d 680 in which the Court held:

> "the right to appeal to this Court does not exist only by the grace of the legislative branch. It does not depend upon the statute,"

and, also the clearly established law in 24 CJS Criminal Law, Para. 1628, page 950 which states:

> "when a right of Appeal is granted by statute it is a substantial or substantive right, which must not be arbitrarily or capriciously withheld. . . ."

The opinion of the Court of Appeals is contrary to every mandate of precedent law regarding lawful jurisdiction of the Court and validity of judgments as each of the following cases show: *Manning* v. *Ketcham* (1932) C.A. 6th, 58 F. 2d 948; *State ex Rel. Allen* v. *Vermillion Circuit Court* (1967) 248 Ind. 258, 226 N.E. 2nd 324; *State ex Rel. Stanton* v. *Murray, Judge; Stanton* v. *State of Indiana* (1952) 231 Ind. 223, 108 N.E. 2d 251; *State ex Rel. Ashbaugh* v. *Circuit Court of Eau Claire County* (1897) 97 Wis. 1, 72 N.W. 193, 38 L.R.A. 554; *Town of Walkerton* v. *N.Y.C. & St. L. R.R. Co.* (1939).

V.

THE INDIANA SUPREME COURT ERRED IN FINDING THAT PETITIONER HAD FAILED TO COMPLY WITH TIME REQUIREMENTS IN FILING HER PETITION FOR LEAVE TO TRANSFER HER CASE FROM THE COURT OF APPEALS TO THE STATE SUPREME COURT.

The Indiana Supreme Court denied appellant's Petition for Transfer, to the Supreme Court from the Court of Appeals, contending that it had been filed one day late.

On at least 27 petitions for extension of time during the last 3 years, the Indiana courts (both trial and appellate) have always acknowledged the validity of a statement by the postmaster that mail received after 5 PM is dated the following day by the Post Office. The Indiana statute specifies that depositing in the mail, if certified or registered, constitutes *actual filing* of the pleading or motion [Ind. Appellate Rule 12(C)] and Indiana Trial Rule 6(E). The Record shows that the Petition for Transfer was deposited per provisions of Appellate Rule 11(B) in the post office on the deadline (20 days) for filing, at 6:45 P.M., after the windows at the post office had been closed but with the building and the deposit-slot still open.

The uncontroverted Verified Certificate of Filing and Statement of the Postmaster are available for review in the Appendix.

As the final and inexcusable act of the Indiana Courts against this cancer-ridden pro-se litigant, the State Supreme Court falsely stated that her Petition had been filed one day too late, whereas it had been filed timely under the state statute allowing for the act of mailing by certified mail to be the filing with the court as of the time of the mailing.

CONCLUSION

It is therefore respectfully requested that this High Court reverse and remand the cause to the Indiana Trial Court, with instructions that the Petitioner's Default Judgment be reinstated, that the change of venue be granted, that discovery be completed with a lack of swiftness corresponding to the doctors' and nurses' recommendations, and that the case proceed to a jury trial before an unbiased judge; or, in the alternative, that the cause be remanded to the Indiana Supreme Court with instructions that the Petition for Transfer had been filed timely and that the Supreme Court should rule upon the case without participation by Justice Pivarnik.

Petitioner respectfully suggests that the High Court hold that dismissal of a lawsuit as sanctions for failing to complete a deposition after falling unconscious is an excessively harsh remedy, and that refusal of the Indiana Supreme Court to consider the appeal by incorrectly finding that the petition was filed one day too late is also an excessive denial of remedy.

Further, petitioner suggests that, to force her, an ill cancer victim, to submit to a deposition on a day when her state of health did not warrant it, was such a swiftness of judicial proceedings as to be a per se denial of due process.

All the practices, procedures, and exercise of "regal power" of the ill-famed "STAR CHAMBER" were abolished by the Habeas Corpus Act of 1641 AND FOR HUNDREDS OF YEARS THE U.S. SUPREME COURT HAS EXPRESSLY STATED THAT OUR CONSTITUTION FORBIDS ANY SUCH PROCEEDINGS. Petitioner respectfully moves that the Honorable High Court reaffirm its rulings and condemn these proceedings and State Appellate Court affirmances as the re-institution of that very dreaded instrument and issue the Writ.

Respectfully submitted,

MARGARET Y. JUSTAK
Petitioner, Pro Se

APPENDIX

APPENDIX 1

IN THE PULASKI CIRCUIT COURT

"STATE OF INDIANA)
) SS.
COUNTY OF PULASKI)

CAUSE NO. 35-52

MARGARET Y. JUSTAK,
Plaintiff

-v-

A. A. BOCHNOWSKI, et al.,
Defendants

ORDER OF DISMISSAL OF ACTION
WITH PREJUDICE AND JUDGMENT

The defendants, Karl J. Stipher, John D. Cochran, Stephen A. Claffey, Charles A. Schalliol and William F. Satterlee ("Defendants"), having appeared in person and by counsel, William S. Spangler of Spangler, Jennings, Spangler & Dougherty, and having filed with the Court their RESPONSE TO PLAINTIFF'S VERIFIED MOTION FOR SANCTIONS AND DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S ACTION WITH PREJUDICE ("MOTION"), which Motion is in the following words and figures, to wit:

(H.I.)

And the Court having held a hearing on the Motion and having heard argument thereon on December 15, 1976, by

the Defendants and Plaintiff, Margaret Y. Justak, appearing *pro se,*

And the plaintiff, Margaret Y. Justak, having filed Motion to Vacate, Set Aside and Expunge from the Record the Several Orders of January 15, 1977, and hearing having been held thereon,

And the Court, being fully and duly advised in the premises and having reviewed the record of proceedings in this action, the prior motions, pleadings, orders and entries entered or filed herein, and the evidence and arguments submitted by the parties,

NOW, THEREFORE, the Court finds that:

1. This action was filed by Margaret Y. Justak, *pro-se,* on September 4, 1975, in the Lake County Superior Court, Room No. 2.

2. The Answer of the Defendants denies all material allegations of the plaintiff's complaint.

3. While the proceeding was pending before the Jasper County Circuit Court, on or about January 8, 1976, Notice to Take Deposition of Plaintiff on January 29, 1976, at 1:30 P.M. was duly served on plaintiff, Margaret Y. Justak, by the Defendants. Plaintiff, without prior notice to the Defendants, failed to appear for the taking of that deposition, as scheduled. The plaintiff sought to excuse her failure to appear and the absence of prior notice to the Defendants by claiming that she was hospitalized. This claim, despite the Court's request, was not substantiated by the plaintiff.

4. A Motion for a Protective Order was subsequently filed by the plaintiff. This Motion was denied by the Court. Trial Rule 26(C) provides that: "If the motion for a protective order is denied in whole or in part, the Court may,

on such terms and conditions as are just, order that any party or person provide or permit discovery."

5. Upon the filing of a Motion to Dismiss by the Defendants, the Court set said motion for hearing and argument before the Court on April 26, 1976. The plaintiff, Margaret Y. Justak, failed to appear at this hearing, again without adequate or proper prior notice to the Defendants and again claiming sudden illness, without substantiation or credible evidentiary support. This Court, on April 26, 1976, entered an Order providing in part as follows:

> "The Court, now being further advised in the premises, finds that the Plaintiff, Margaret Y. Justak, should make herself available for the taking of her deposition, and does now order that Margaret Y. Justak appear for the taking of her deposition * * * on the 3rd day of June, 1976, at the hour of 10:00 o'clock A.M. Central Daylight Time, and if she should fail to appear as ordered herein on said date at said time and place, the Court shall dismiss this action."

The plaintiff was duly advised of, and served with a copy of, such order by the Clerk of this Court.

6. At the appointed hour on June 3, 1976, Margaret Y. Justak appeared at the offices of the Court Reporter before whom her deposition was scheduled. Although physically appearing for the deposition, the plaintiff declared again that she was physically unable to give her deposition and not responsible for her statements due to the influence of self-administered medication, which she claimed was required by a doctor's order. Again, the claims of the plaintiff with respect to physical infirmity were not substantiated or supported by the submission of any credible evidence to the Court. The plaintiff has failed to support her claim that the medication purportedly taken by her

was required by the order of a qualified physician or that such medication would have the claimed debilitating effect on her.

7. The Defendants again sought relief from the Court and following another hearing before the Court held on June 21, 1976, the Court entered an Order which provided, in part, as follows:

> "Accordingly, the Court now orders Margaret Y. Justak to make herself available to resume the taking of her deposition, and that the said Margaret Y. Justak appear physically and mentally able, for the taking of her deposition before Gerry R. Yates, Official Court Reporter, United States District Court, Northern District of Indiana, Hammond Division, 507 State Street, Hammond, Indiana, 46320, or one of her assistants on the 19th day of July, 1976, at the hour of 10:00 A.M. Central Daylight Time, and if she should fail to appear as ordered herein on said date at said time and place, the court shall dismiss this action. Further, it is ordered that in the event said Plaintiff, Margaret Y. Justak is not physically and mentally able to testify, that she present timely to this court a sworn affidavit made by and from a regular medical practitioner stating that said plaintiff is unable to proceed with the taking of said deposition; or upon failure to do so and the plaintiff is unable to proceed with the taking of said deposition, the Court shall suspend all action and dismiss this action until the said Margaret Y. Justak plaintiff is able to pursue and comply with the rules of Indiana Procedure relating to discovery by the defendants."

8. The plaintiff appeared and was sworn in for the taking of her deposition of July 19, 1976, as scheduled. However, the plaintiff, without justification, refused to answer numerous pertinent, relevant and material questions

propounded to her by counsel for the Defendants. Furthermore, the Defendants were prevented from completing this deposition as the result of the plaintiff again claiming sudden and debilitating illness. Credible and proper medical evidence to support this claim has not been presented to the Court.

9. Plaintiff failed, as required by the Order of this Court, to timely file with this Court a sworn affidavit made by and from a regular, licensed medical practitioner stating that the plaintiff is unable to proceed with or to give her deposition.

10. The plaintiff has energetically participated in several lengthy hearings before this Court, all without physical difficulty or illness.

11. The plaintiff has repeatedly and willfully refused to comply with the orders of this Court respecting discovery. The evasive and obstructive tactics of the plaintiff have been in bad faith and are without meritorious excuse or justification. The Defendants have been thwarted without good cause and to their detriment from obtaining discovery for over one year.

12. The claims of the plaintiff have not been supported by proper and credible evidence and her behavior has been inexcusable. The Defendants have suffered irreparable harm and will continue to be damaged were this action to be permitted to continue.

13. Every reasonable effort has been made by the Court and the Defendants to compel the plaintiff to submit to proper and meaningful discovery, all without success.

14. A grant of relief to the Defendants short of dismissal of the action with prejudice will not be adequate or effective. Additional leniency or patience is not ap-

propriate. The plaintiff has abused the Court and its orders. The plaintiff has filed numerous dilatory, obstructive, and sham pleadings and motions in an effort to continue her avoidance of discovery. The claims of the plaintiff have approached a scandal and contempt of this Court and the Defendants.

15. It is the duty of this Court, under Trial Rule 37(B) to prevent abuse of discovery proceedings and to secure enforcement of the discovery provisions of the Trial Rules. Dismissal of plaintiff's action with prejudice is an appropriate remedy under the factual circumstances presented to this Court and necessary to properly protect the integrity of the discovery rules of this Court and State and the rights of the Defendants. This Court specifically finds and determines that the conduct of the plaintiff has and will continue to so delay and obstruct the rights of the Defendants, that relief other than Dismissal with Prejudice would be inadequate.

NOW, THEREFORE, the Court ORDERS, ADJUDGES AND DECREES THAT:

1. Plaintiff's Motion to Vacate, Set Aside, and Expunge is hereby denied;

2. The plaintiff's action in this cause against the Defendants and all other defendants be, and hereby is, DISMISSED WITH PREJUDICE, and judgment is rendered in favor of the Defendants and against the plaintiff in this action; costs against the plaintiff; and,

3. The Clerk of this Court is hereby ordered to mail a copy of this ORDER OF DISMISSAL AND JUDGMENT to all parties.

Dated April 8, 1977.

(Sig) *Harold R. Staffeldt*
Judge, Pulaski County
Circuit Court

APPENDIX 2

FOR PUBLICATION

APPELLANT:
PRO SE
447 - 139th Street
Hammond, Indiana

ATTORNEYS FOR APPELLEES:
DAVID A. BOCHNOWSKI
Suite 1, Cataldi Professional Building
231 Joliet Street
Dyer, Indiana 46311
Attorney for:
A. A. Bochnowski

WILLIAM S. SPANGLER
Spangler, Jennings, Spangler & Dougherty
31 East Fifth Avenue
Gary, Indiana 46402
Attorney for:
John D. Cochran, Karl J. Stipher,
Stephen A. Claffey, Charles E. Schalliol
and William F. Satterlee III

JAMES B. MEYER
John M. O'Drobinak
Teibel Plaza, 833 West Lincoln Highway
Schererville, Indiana 46375
Attorney for:
Walter Schrage,
First Bank of Whiting

IN THE

COURT OF APPEALS OF INDIANA
THIRD DISTRICT

MARGARET Y. JUSTAK,
Appellant-Plaintiff,

v. NO. PS 404

A.A. BOCHNOWSKI, ET AL.,
Appellees-Defendants.

APPEAL FROM THE PULASKI CIRCUIT COURT

Honorable Harold R. Staffeldt, Judge

(Filed Jul 23 1979)

STATON, J.

Margaret Justak's complaint against the various defendants was dismissed with prejudice. Finding no reversible error, we affirm.

I.

Dismissal With Prejudice

The following findings of the trial court, along with the corresponding dismissal of the action with prejudice, are the subjects of Justak's first specification of error:

> "3. While the proceeding was pending before the Jasper County Circuit Court, on or about January 8, 1976, Notice to Take Deposition of Plaintiff on January 29, 1976, at 1:30 P.M. was duly served on plaintiff, Margaret Y. Justak, by the Defendants. Plaintiff, without prior notice to the defendants, failed to appear for the taking of that deposition, as scheduled.

The plaintiff sought to excuse her failure to appear and the absence of prior notice to the Defendants by claiming that she was hospitalized. This claim, despite the Court's request, was not substantiated by the plaintiff.

"4. A Motion for Protective Order was subsequently filed by the plaintiff. This Motion was denied by the Court. Trial Rule 26(C) provides that: 'If the motion for a protective order is denied in whole or in part, the Court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.'

"5. Upon the filing of a Motion to Dismiss by the Defendants, the Court set said motion for hearing and argument before the Court on April 26, 1976. The plaintiff, Margaret Y. Justak, failed to appear at this hearing, again without adequate or proper notice to the Defendants and again claiming sudden illness, without substantiation or credible evidentiary support. This Court, on April 26, 1976, entered an Order providing in part as follows:

> 'The Court, now being further advised in the premises, finds that the Plaintiff, Margaret Y. Justak, should make herself available for the taking of her deposition, and does now order that Margaret Y. Justak appear for the taking of her deposition * * * on the 3rd day of June, 1976, at the hour of 10:00 o'clock A.M. Central Daylight Time, and if she should fail to appear as ordered herein on said date at said time and place, the Court shall dismiss this action.'

"The plaintiff was duly advised of, and served with a copy of, such order by the Clerk of this Court.

"6. At the appointed hour on June 3, 1976, Margaret Y. Justak appeared at the offices of the Court Reporter before whom her deposition was scheduled. Although physically appearing for the deposition, the plaintiff declared again that she was physically unable to give

her deposition and not responsible for her statements due to the influence of self-administered medication, which she claimed was required by a doctor's order. Again, the claims of the plaintiff with respect to physical infirmity were not substantiated or supported by the submission of any credible evidence to the Court. The plaintiff has failed to support her claim that the medication purportedly taken by her was required by the order of a qualified physician or that such medication would have claimed debilitating effect on her.

"7. The Defendants again sought relief from the Court, and following another hearing before the Court held on June 21, 1976, the Court entered an Order which provided, in part, as follows:

> 'Accordingly, the Court now orders Margaret Y. Justak to make herself available to resume the taking of her deposition, and that the said Margaret Y. Justak appear physically and mentally able, for the taking of her deposition before Gerry R. Yates, Official Court Reporter, United States District Court, Northern District of Indiana, Hammond Division, 507 State Street, Hammond, Indiana, 46320, or one of her assistants on the 19th day of July, 1976, at the hour of 10:00 A.M. Central Daylight Time, and if she should fail to appear as ordered herein on said date at said time and place, the Court shall dismiss this action. Further, it is ordered that in the event said plaintiff, Margaret Y. Justak is not physically and mentally able to testify, that she present timely to this court a sworn affidavit made by and from a regular medical practitioner stating that said plaintiff is unable to proceed with the taking of said deposition; or upon failure to do so and the plaintiff is unable to proceed with the taking of said deposition, the Court shall suspend all action and dismiss this action until the said Margaret Y. Justak plaintiff is able to pursue and comply with the rules of Indiana procedure relating to discovery by the defendants.'

"8. The plaintiff appeared and was sworn in for the taking of her deposition of July 19, 1976, as scheduled. . . . [T]he Defendants were prevented from completing this deposition as the result of the plain tiff again claiming sudden and debilitating illness Credible and proper medical evidence to support this claim has not been presented to the Court.

"9. Plaintiff failed, as required by the Order of this Court, to timely file with this Court a sworn affidavit made by and from a regular, licensed medical practitioner stating that the plaintiff is unable to proceed with or to give her deposition.

"10. The plaintiff has energetically participated in several lengthy hearings before this Court, all without physical difficulty or illness.

"11. The plaintiff has repeatedly and willfully refused to comply with the orders of this Court respecting discovery. The evasive and obstructive tactics of the plaintiff have been in bad faith and are without meritorious excuse or justification. The Defendants have been thwarted without good cause and to their detriment from obtaining discovery for over one year.

"12. The claims of the plaintiff have not been supported by proper and creidble [*sic*] evidence and her behavior has been inexcusable. The Defendants have suffered irreparable harm and will continue to be damaged were this action to be permitted to continue.

"13. Every reasonable effort has been made by the Court and the Defendants to compel the plaintiff to submit to proper and meaningful discovery, all without success.

"14. A grant of relief to the Defendants short of dismissal of the action with prejudice will not be adequate or effective. Additional leniency or patience is not appropriate. The plaintiff has abused the Court and its orders. The plaintiff has filed numerous dilatory, obstructive and sham pleadings and motions in an effort to continue her avoidance of discovery. The

claims of the plaintiff have approached a scandal and contempt on this Court and the Defendants.

"15. It is the duty of this Court, under Trial Rule 37(B), to prevent abuse of discovery proceedings and to secure enforcement of the discovery provisions of the Trial Rules. Dismisal [*sic*] of plaintiff's action with prejudice is an appropriate remedy under the factual circumstances presented to this Court and necessary to properly protect the integrity of the discovery rules of this Court and State and the rights of the Defendants. This Court specifically finds and determines that the conduct of the plaintiff had and will continue to so delay and obstruct the rights of the Defendants, that relief other than Dismissal with prejudice would be inadequate."

The trial court then entered an order dismissing Justak's complaint with prejudice.

Justak's first contention is that the trial court erred in denying the motion for a protective order referred to in Finding #4. She had alleged that because of her health, submission to a deposition upon oral examination would constitute an undue burden upon her. She therefore requested the trial court to prohibit the defendants from deposing her and to limit the method of discovery to that of written interrogatories.

The trial court's authority to grant such a motion is recognized by Ind. Rules of Procedure, Trial Rule 26(C), which reads in pertinent part as follows:

"(C) Protective orders. Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is being taken may make any order which justice requires to protect a party or person from an-

noyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * *

"(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery. . . ."

A trial court exercises judicial discretion in ruling upon discovery matters, and this Court will interfere only upon a showing that the trial court abused its discretion. *Costanzi* v. *Ryan* (1978), ... Ind.App. ....., 370 N.E.2d 1333. Here, Justak failed to substantiate her allegations concerning her health. Under those circumstances, we cannot say that the trial court abused its discretion in denying the motion for the protective order.

Next, Justak challenges the sanctions imposed against her. TR. 37(B) lists the various sanctions that a trial court may employ in order to avoid abuses of discovery proceedings and in order to secure compliance with the discovery provisions of the trial rules. Dismissal with prejudice is one of those sanctions. Because of the severity of that sanction, it should be invoked only when the trial court finds that: (1) a party has in bad faith and abusively resisted or obstructed discovery; and (2) the conduct of that party has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate. *Clark County State Bank* v. *Bennett* (1975), ... Ind.App. ....., 336 N.E.2d 663. Again we note, however, that this is a matter committed to the discretion of the trial court.

Justak contends that the circumstances did not warrant the dismissal of her complaint. The record, however, supports the trial court's action. Justak repeatedly failed to appear at scheduled hearings and for depositions of which she had notice. On the instances when she did appear for

the purpose of being deposed, she either claimed to be ill or on medication which prevented her from answering questions. Despite the trial court's requests, she failed to substantiate her claims of illness or of required medication with sworn affidavits from medical practitioners.[1] These facts amply support the trial court's finding that Justak was in bad faith and abusively resisting or obstructing discovery.

In determining the propriety of the trial court's action, it is important to note the type of discovery that Justak was resisting—deposition upon oral examination. Discovery is one of the most important phases of any law suit and deposition upon oral examination is perhaps the most effective means of obtaining discovery. Justak's refusal to submit to a deposition and her apparent inability to substantiate her claim that she was physically unable to do so precluded the defendants' use of that avenue of discovery. That preclusion substantially hindered the defendants in their efforts to defend themselves against Justak's charges. We cannot say that the trial court, under those circumstances, abused its discretion in dismissing the cause with prejudice.

Justak further contends that the conclusion that sanctions were required was predicated upon a determination of certain facts (e.g., whether or not she was acting in good faith) and that, pursuant to her right to a trial by jury, she was entitled to have those facts determined by a jury. The term "trial" contemplates a final adjudication of the case on the merits. *City of Fort Wayne* v. *State*

---

[1] Justak did submit an affidavit from a doctor who averred that he examined her on the evening of July 19, 1976, that he then prescribed medication for her, and that he saw her next one month later. The Affidavit does not indicate that she was hospitalized or that her condition necessitated a curtailment of her activities.

ex rel. Hoagland (1976), ... Ind.App. ....., 342 N.E.2d 865. A hearing on a motion for sanctions can result in a final adjudication of a case but, because such an adjudication is not rendered on the merits of the case, the hearing does not constitute a trial. *Cf. Grecco* v. *Campbell* (1979), ... Ind.App. ....., 386 N.E.2d 960 (hearing on motion for default judgment does not constitute a trial). Justak was not entitled to have a jury empanelled for the hearing.

II.

Default Judgment

The following facts develop the scenario for Justak's next contention of error: On January 12, 1976, the defendant Bochnowski filed his answer to Justak's complaint. On January 19, 1976, the clerk of the Jasper Circuit Court, without referring the matter to a judge, signed a document entitled "Judgment By Default," which purported to award a judgment of one million dollars in favor of Justak and against the defendant Bochnowski.

On January 20, the clerk brought the entry of judgment to the attention of the judge of the court. The judge scheduled a hearing for January 23 for the purpose of determining whether the entry should be rescinded. Prior to that hearing, Justak filed a motion for a change of judge and for a change of venue from the county. At the January 23 hearing, the judge rescinded the entry of judgment and then granted the change of venue.

Justak contends that the trial court was divested of jurisdiction upon the filing of her motion. Accordingly, her argument continues, the trial court's rescission of the entry of judgment is void for want of jurisdiction.

Justak's motion was filed within ten days after the issues were first closed on the merits. Therefore, the judge had no discretion in ruling on the motion; he was required

to direct the change of venue. TR. 76. Furthermore, upon the filing of the motion, the trial court was divested of jurisdiction except to grant the change of venue and to hear emergency matters. *City of Fort Wayne* v. *State ex rel. Hoagland, supra.* The rescission of the entry of judgment did not constitute an emergency matter. Thus, Justak is correct in her contention that the rescission is void for want of jurisdiction. For reasons explained below, however, the absence of a legally effective rescission is of no consequence.

Default judgments are provided for in TR. 55. TR. 55 (A) permits the clerk, without the intervention of the court, to make an "entry of default." An entry of default, however, is not a judgment. 3 W. HARVEY, INDIANA PRACTICE § 55.2 at 523 (1970). A judgment by default can only be entered by the court. Because the clerk had absolutely no authority to enter a judgment, the "judgment" he did enter was void. A void judgment is, in legal effect, no judgment. By it, no rights were divested and from it no rights were obtained. *Furness* v. *Brummitt* (1911), 48 Ind.App. 442, 95 N.E. 1114. It is thus inconsequential that the action to rescind the judgment was also void.

Pursuant to the granting of the change of venue, the cause was transferred from Jasper County to Pulaski County. Two months later, Justak filed yet another motion for a change of judge, arguing that the presiding judge was biased and prejudiced because of "close personal, professional, and political relationships" with some of the defendants. The trial court allowed Justak ten days to support the allegations of her motion with sworn testimony. She failed to do so. She argues on appeal that the duty to grant the motion was mandatory and that the trial court therefore erred in denying the motion.

Justak's analysis of the change of judge provisions of TR. 76 is incorrect. The motion was not made within ten days after the issues were first closed on the merits and, for that reason alone, an automatic change of judge was not available to Justak. Rather, the motion was addressed to the discretion of the trial court. TR. 76(8). Justak has failed to show us how the trial court abused that discretion.

III.

Jurisdiction

Justak's next specification of error reads as follows:

> "REPEATED VIOLATION OF PLAINTIFF'S CONSTITUTIONAL RIGHTS TO THE POINT OF 'SUSPENDING' HER RIGHT TO LIFE TOGETHER WITH REPEATED 'EX-PARTE' HEARINGS HAD AND HELD ON MOTIONS THAT WERE NEVER SET FOR HEARING, AND THE RENDERING OF FINDINGS AND JUDGEMENT [*sic*] DIRECTLY IN OPPOSITION AND CONTRARY TO THE MASS OF EVIDENCE AND CASE LAW AVAILABLE ESTABLISHED THE PROCEEDINGS AS BEING A 'SHAM' AND 'MOCKERY' OF LAW TO SUCH A DEGREE THAT THE TRIAL JUDGE MUST BE DEEMED TO HAVE 'LOST JURISDICTION' AND ANY JUDGEMENT [*sic*] RENDERED TO BE A LEGAL 'NULLITY' AND 'VOID' FOR SUCH DISPLAY OF PREJUDICE, HOSTILITY, AND ABUSE OF DISCRETION."

These allegations are specious at best. Her "argument" in support thereof consists primarily of a cumulative repetition of matters we have previously discussed (i.e., the denial of her motion for a protective order, the dismissal with prejudice and the rescission of the default judgment). Justak presents no additional contentions by way of cogent argument in this section of her brief. There is no need to

encumber this opinion with a reiteration of our resolution of the matters previously discussed. It suffices to say that we find no constitutional violations and that the proceedings were not a "sham and mockery of law."

IV.

TR. 53.1

Justak's final contention is that the Supreme Court of Indiana erred in failing to withdraw the cause, pursuant to TR. 53.1, from one of the many trial judges who has presided over this matter. It is a fundamental principle of appellate procedure that this Court has no jurisdiction to review action of our Supreme Court. *See* Ind. Rules of Procedure, Appellate Rule 4.

The order of the trial court dismissing Justak's complaint with prejudice is affirmed.

GARRARD, P.J., and HOFFMAN, J., Concu..

APPENDIX 3

STATE OF INDIANA

Clerk of the Supreme Court
and Court of Appeals
Billie R. McCullough, Clerk
217 State House
Indianapolis, 46204

Telephone 633-5200

No. PS 404
Margaret Y. Justak V.
A. A. Bochnowski, et al

You are hereby notified that the Court of Appeals has on this day denied the Petition for Rehearing.

Please acknowledge receipt of this notice in order that our records may show that you have been notified in this action.

WITNESS my name and seal of said Court, this 29 day of Aug., 1979.

/s/ *Marjorie H. O'Laughlin*
/s/ *Billie R. McCullough*
Clerk Supreme Court and Court of Appeals

APPENDIX 4

IN THE
SUPREME COURT OF INDIANA

MARGARET Y. JUSTAK,
Appellant-Plaintiff,

-v- CAUSE NO. PS 404

A. A. BOCHNOWSKI, ET AL.,
Appellees-Defendants.

ORDER

DISMISSING "PETITION FOR TRANSFER OF MARGARET Y. JUSTAK"

"Petition for Transfer of Margaret Y. Justak" is hereby DISMISSED for failure to comply with the time requirements of Rule A.P. 11(B).

DONE AT INDIANAPOLIS, INDIANA this 13 day of December, 1979.

/s/ *Richard M. Givan*
RICHARD M. GIVAN
Chief Justice of Indiana

All Justices concur in dismissal, excepting Given, C. J., who votes to deny transfer, and Pivarnik, J., who is not participating.

APPENDIX 5

September 18, 1979

Marjorie H. O'Laughlin, Clerk
Supreme Court of Indiana
217 State House
Indianapolis, Indiana 46204

In Re: Margaret Y. Justak, Appellant-Plaintiff vs. A. A. Bochnowski, Et Al., Appellees-Defendants, Cause No. PS 404

Dear Ms. O'Laughlin:

Filed herewith by Certified Mail, Return Receipt Requested in accordance with Appellate Rule 12(c), is the required nine (9) copies of Appellant's Petition to Transfer pursuant to Appellate Rule 11(B); my Money Order in the amount of $100.00 to cover the filing fee as provided for in Appellate Rule 11(B) (7); and, five (5) copies of my Certificate of Filing to cover the above tendered documents.

Please return a file marked copy of the Certificate of Filing in the envelope provided. Proof of Service on the opposing Counsel is included in the Certificate of Filing as well as in the Verification attached to the Petition.

The Petition for Transfer is due on or before September 18, 1979 and is timely filed. I have enclosed a statement from the postmaster to clarify any misconception

regarding the postmark. We were forced to mail the above and enclosed after 6:15 p.m. and therefore the following days postmark appears.

Thank you for your assistance in this matter.

Yours truly,

/s/ Margaret Y. Justak
Margaret Y. Justak
447-139th Street
Hammond, Indiana
219/931-8277

Encl: 5 copies of "Certificate of Filing"

9 copies of Appellant's Petition to Transfer

1 letter from postmaster

1 money order for $100.00

IN THE

SUPREME COURT OF INDIANA
CAUSE NO. PS 404

MARGARET Y. JUSTAK,

Appellant-Plaintiff,

-v-

A.A. BOCHNOWSKI, ET AL.,

Appellees-Defendants

APPEAL FROM THE PULASKI CIRCUIT COURT
HON. HAROLD R. STAFFELDT, JUDGE PRESIDING

CERTIFICATE OF FILING

Margaret Y. Justak, being first duly sworn, upon her oath does depose and say:

(1.) That on the 18th day of September, 1979, I filed and served the nine (9) copies of the Appellant's Petition for Transfer to the Supreme Court of Indiana by Certified Mail, Return Receipt Requested to Marjorie H. O'Laughlin, Clerk of the Supreme Court of Indiana, 217 State House, Indianapolis, Indiana, all as provided under Appellate Rule 12(c).

(2.) That a copy of said Petition For Transfer was mailed to Appellee's Counsels of record (David A. Bochnowski, Suite 1, Cataldi Professional Building, 231 Joliet Street, Dyer, Indiana, 46311; William S. Spangler, Span-

gler, Jennings, Spangler & Dougherty, 31 E. 5th Ave., Gary, Indiana, 46402; James B. Meyer, Teibel Plaza, 833 W. Lincoln Hwy., Schererville, Indiana; 46375) at their office addresses as stated above by U.S. Mail on September 18, 1979.

(3.) Also, pursuant to the provisions of Appellate Rule 11(B)(7) I enclosed a money order in the amount of $100.00 as the filing fee for the Petition For Transfer.

AND FURTHER AFFIANT SAITH NOT.

/s/ *Margaret Y. Justak*
Margaret Y. Justak
Appellant-Plaintiff-Pro-Se
447-139th Street
Hammond, Indiana
219/931-8277

Subscribed and sworn to before me, a Notary Public, for and in the State of Indiana, County of Lake, on this 18th day of September, 1979.

My Commission Expires 5/9/83.

/s/ *Sheila Shoumake*
Notary Public
Sheila Shoumake

APPENDIX 6

UNITED STATES POST OFFICE
MUNDELEIN, ILLINOIS

AUGUST 13, 1979

TO WHOM IT MAY CONCERN:

It is the standard practice of this Post Office that mail deposited after 5:45 P.M. in our drop boxes will carry the following day's postmark. Therefore mail deposited with us after the above time when personnel have left the premises will be dated the following date although on our physical premises.

/s/ Ray Antes
POSTMASTER, RAY ANTES

APPENDIX 7

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE PULASKI CIRCUIT COURT
CAUSE NO. 35-52

AFFIDAVIT

John E. Roche, M.D., being first duly sworn on oath, deposes and says:

(1.) That Margaret Y. Justak is now and has been in the past a patient of mine.

(2.) That on the evening of July 19, 1976, I attended Mrs. Justak for treatment of paroxysmal tachycardia and congestive heart failure.

(3.) This patient was brought to my office and upon examination was found to have a pulse of 140 per minute; mild dyspnea and edema of lower extremities. Blood pressure was 160/90.

(4.) Treatment consisted of intramuscular injection of digitalis and lasix. Patient was advised to take digitalis daily by mouth and continue with the valium as previously prescribed and lasix by mouth everyday and to rest at home.

(5.) That I again attended the above patient on August 13, 1976 and after re-examination, ordered her to continue the above prescription with the exception that the taking of lasix should be only as and when needed.

AND FURTHER AFFIANT SAITH NOT.

/s/ *J. E. Roche MD*
John E. Roche

Subscribed and sworn to before me, a Notary Public, for and in the State of Illinois, County of Cook, on this 2nd day of September, 1976.

/s/ *Sydney V. Davis*
Notary Public

My Commission Expires: Nov. 15, 1976.

IN THE PULASKI CIRCUIT COURT
SITTING AT WINAMAC, INDIANA

STATE OF INDIANA)
) SS.
COUNTY OF LAKE)

CAUSE NO 35-52

Filed October 14, 1976

AFFIDAVIT

Josephine Chism, being first duly sworn upon oath, does depose and says:

(1.) That she is a duly, licenced nurse (L.P.N.) under the laws of the State of Indiana.

(2.) That she has in excess of 15 years of experience as a nurse and is now and has been assigned to the intensive care section of Mercy Hospital in Lake County, Indiana and her authority and duties therein are nearly identical and undistinguishable from those of the Registered Nurses assigned thereto.

(3.) That at the request of Margaret Y. Justak, a patient of the undersigned, she attended a deposition at the Federal Court House in Hammond, Indiana on the 19th of July, 1976.

(4.) That in an abusive and arrogant fashion, a person whom she later learned to be William Spangler, the Attorney for the Defendants, challenged her authority and presence at the hearing.

(5.) This abusive challenge was only overcome when she offered to present her credentials and when Mrs. Justak informed Mr. Spangler that she demanded my presence as both a witness to the proceedings as well as her personal nurse.

(6.) That for a period in excess of 2½ hours and after having been advised that in order to comply with the Court Order, Mrs. Justak had not taken her medication, Mr. Spangler unleashed in a brutal fashion a barrage of questions to which Mrs. Justak objected to repeatedly as not being pertinent to the pleadings and in fact being a violation of her Constitutional rights.

(7.) After two hours of experiencing the above described gruelling interrogation, Mrs. Justak began to complain of illness and implored her questionor to stop harrassing her and to ask questions pertinent to the issues. Whereupon, a short recess was taken and she examined Mrs. Justak with her stethescope at approximately 12:15 p.m. after having observed her in a massive cold sweat on the forearms, neck, and face. Mrs. Justak's apicol registered at 140 indicating a tachycardia of a dangerous degree. For this reason and as a professional nurse, she ordered Mrs. Justak to take her previously prescribed medication consisting of 10 mg. of valium and to lie in a prone position as she feared a possible heart attack.

(8.) Upon returning to the hearing room with Mrs. Justak and prior to the resumption of the questioning, the deponent stated the following to the

gathered inquisitors: "Gentlemen, Mrs. Justak's apicol is very high and as her nurse I have ordered her to take her prescribed medicine." Whereupon, Mr. William Spangler became irate, indignant, and offensive and challenged the authority of the deponent for taking an action which she in good faith and as a professional knew to be a proper response to the symptoms and readings observed for her patient, Mrs. Justak.

(9.) Mr. Spangler then directly challenged Mrs. Justak in a mocking tone, that if by reason of having taken medication she was now claiming inability to proceed with the questioning and to which Mrs. Justak responded, "I am willing to continue".

(10.) Mr. Spangler then took a deep breath, jutting his chin toward Mrs. Justak and said, "Fine, because I have no intention of dismissing this deposition" and he then thereafter continued the same line of questioning to which Mrs. Justak repeatedly objected as being impertinent and an intrusion into the strategy, tactics, and legal approach to her case which inquiry was forbidden by a specific ruling of the Indiana State Supreme Court.

(11.) Mr. Spangler then informed those present that he wished to take a lunch break for approximately one hour. Mrs. Justak responded that if such a break should take place, she would probably fall asleep and would be unable to be reawakened by reason of her exhausted condition and the effects of the medication taken. Mr. Spangler thereupon resumed questioning.

(12.) That thereafter your deponent observed an increase in perspiration on the part of Mrs. Justak; a whiteness all about her face; and difficulty on

the part of Mrs. Justak to hold her head erect without leaning upon her hands which were supported by the table. Mrs. Justak then audibly complained that she was becoming very ill and nauseous. She repeated this statement several times but Mr. Spangler continued his inquisition with the precision of a rivetting hammer.

(13.) After another hour of this barbaric process, the deponent again took the apicol and pulse of Mrs. Justak and found that the rate was even higher than before and to be dangerously rapid in each instance and that all color was leaving her face in addition to profuse perspiration throughout her body.

(14.) The deponent attempted to make another statement to indicate to all present the seriousness of Mrs. Justak's condition but was ignored by Mr. Spangler who proceeded to insist that Mrs. Justak begin to identify an assortment of letters purported to be relevant to the deposition. The symptoms of Mrs. Justak became more pronounced and as the deponent searched in her purse for more napkins with which to wipe away the heavy perspiration from Mrs. Justak's person, and without forewarning, the deponent hear a loud "thump", and turning in that direction was shocked to see her patient had fallen from the chair and was lying unconscious on the floor and hyperventillating.

(15.) All of the would be inquisitors and officers of the Court in a purely honorable fashion ran from the room as your deponent yelled after them, "Please help me . . . please help me, I can't move her from this position alone."

(16.) This condition existed for over two minutes and the deponent was preparing to render mouth-to-

mouth resuscitation whereupon Mrs. Justak began to regain consciousness. The only assistance rendered to the deponent or her patient during this critical period was by a Deupty Marshall who assisted the deponent in replacing Mrs. Justak into her chair.

(17.) Ambulance personnel appeared and urged Mrs. Justak to go to the hospital. She considered doing so but then declined stating that she was thoroughly familiar with hospital procedure and would result in an indefinite stay in the emergency room without treatment and that she would receive better treatment by her own nurse at home.

(18.) Deponent then addressed Mr. Spangler as follows: "You are the one that brought this process into being and you are the one that will dismiss it because you can see that my patient is much too ill to continue,", and to which Mr. Spangler replied: "Far be it from me to dispute that fact." Whereupon, he ordered the Court Reporter to terminate the deposition.

(19.) That this instrument consisting of four (4) pages has been read by myself and I certify that to the best of belief and knowledge the facts presented therein are true.

AND FURTHER AFFIANT SAITH NOT.

Josephine Chism
Josephine Chism

Subscribed and sworn to before me, a Notary Public, this 16th day of August, 1976.

Richard C. Hajduck
Notary Public

My Commission Expires 1-25-79
(Notary Seal)

IN THE PULASKI CIRCUIT COURT

STATE OF INDIANA)
) SS:
COUNTY OF PULASKI)

CAUSE NO. 35-52

Filed October 14, 1976

AFFIDAVIT

Mildred Kroll, being first duly sworn upon oath, does depose and says:

(1.) That she is a citizen and resident of the State of Indiana, County of Lake.

(2.) That she is not a party or named witness in the above cause and has no financial interest in the outcome of this action.

(3.) That as a Citizen interested in public justice and Court process, she attended a hearing held in the above cause on the 21 day of June, 1976 in Winamac, Indiana as a Court Observer.

(4.) Having arrived nearly a ½ hour before the hearing, I observed a group of men at the front of the Court room having a pleasant conversation. Upon closer attention, I saw that one of the men was wearing the robes of a Judge and that a girl was present and seated before a machine for transmitting.

(5.) I later learned that these men were the Defendants, Karl Stipher, Stephen Claffey, A. A. Bochnowski and their Attorney William Spangler and one of his Assistants and a Judge Harold R. Staffeld.

(6.) That when Mrs. Justak entered the room she was asked to identify herself and to state whether or not she was ready. When she answered that she was not ready and that the time for the hearing had not yet arrived, all of the men smiled and the Judge left the Court room.

(7.) During the course of the hearing, it appeared that whatever argument or legal things Mrs. Justak presented, the Judge was not even listening or interested and allowed Mr. Spangler to interrupt and speak as he wished.

(8.) I was personally shocked to hear the Court order Mrs. Justak to appear for a Deposition under threat of dismissing her suit and after she had presented so many facts and doctor's statements showing that she was too ill to do so because of her cancer condition.

(9.) That at the conclusion of the hearing the Judge entered his Chambers and was quickly followed by Mr. William Spangler who put papers into his valise which had obviously been left in the Judge's Chambers sometime prior to my entering the Court room. The rest of the men also went to the Judge's Chambers and were joking and laughing.

(10.) That all that I saw and heard seemed very improper to me in view of other Court proceedings that I have attended. This is especially true because during the hearing Mr. Spangler said

that he didn't know the Judge and was in no way friendly with him.

(11.) I later learned that Mrs. Justak did appear for the deposition on July 19, 1976 and that an ambulance had to be called because she had some type of a severe attack and was unconscious. I later learned that it was a heart failure because she could not take her medicine, under order of the Court.

(12.) That in view of the above, and as an average citizen, I would never want to have any case of mine tried before this Judge and am of the opinion that the whole proceeding was very improper and prejudiced.

AND FURTHER AFFIANT SAITH NOT.

Mildred Kroll

Subscribed and sworn to before me, a Notary Public, this 16th day of August, 1976.

Richard C. Hajduck
Notary Public

My Commission Expires 1-25-79

IN THE PULASKI CIRCUIT COURT

STATE OF INDIANA)
) SS:
COUNTY OF PULASKI)

CAUSE NO. 35-52

Filed October 14, 1976

AFFIDAVIT

Elizabeth Slivka, being first duly sworn upon oath, does depose and says:

(1.) That she is a citizen and resident of the State of Indiana, County of Lake.

(2.) That she is not a party or named witness in the above cause and has no financial interest in the outcome of this action.

(3.) That as a Citizen interested in public justice and Court process, she attended a hearing held in the above cause on the 21 day of June, 1976 in Winamac, Indiana as a Court Observer.

(4.) Having arrived nearly a ½ hour before the hearing, I observed a group of men at the front of the Court room having a pleasant conversation. Upon closer attention, I saw that one of the men was wearing the robes of a Judge and that a girl was present and seated before a machine for transcribing.

(5.) I later learned that these men were the Defendants, Karl Stipher, Stephen Claffey, A. A. Bochnowski, and their Attorney William Spangler and one of his Assistants and a Judge Harold R. Staffeldt.

(6.) That when Mrs. Justak entered the room she was asked to identify herself and to state whether or not she was ready. When she answered that she was not ready and that the time for the hearing had not yet arrived, all of the men smiled and the Judge left the Court room.

(7.) During the course of the hearing, it appeared that whatever argument or legal things Mrs. Justak presented, the Judge was not even listening or interested and allowed Mr. Spangler to interrupt and speak as he wished.

(8.) I was personally shocked to hear the Court order Mrs. Justak to appear for a Deposition under threat of dismissing her suit and after she had presented so many facts and doctor's statements showing that she was too ill to do so because of her cancer condition.

(9.) That at the conclusion of the hearing the Judge entered his Chambers and was quickly followed by Mr. William Spangler who put papers into his valise which had obviously been left in the Judge's Chambers sometime prior to my entering the Court room. The rest of the men also went to to the Judge's Chambers and were joking and laughing.

(10.) That all that I saw and heard seemed very improper to me in view of other Court proceedings that I have attended. This is especially true

because during the hearing Mr. Spangler said that he didn't know the Judge and was in no way friendly with him.

(11.) I later learned that Mrs. Justak did appear for the deposition on July 19, 1976 and that an ambulance had to be called because she had some type of a severe attack and was unconscious. I later learned that it was a heart failure because she could not take her medicine, under orders of the Court.

(12.) That in view of the above, and as an average citizen, I would never want to have any case of mine tried before this Judge and am of the opinion that the whole proceeding was very improper and prejudiced.

AND FURTHER AFFIANT SAITH NOT.

Elizabeth Slivka

Subscribed and sworn to before me, a Notary Public, this 16th day of August, 1976.

Richard C. Hajduch
Notary Public

My Commission Expires 1-25-79
(Notary Seal)

APPENDIX 8

SUPREME COURT OF THE UNITED STATES

No. A-856

MARGARET Y. JUSTAK,
Petitioner

v.

A. A. BOCHNOWSKI, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 11, 1980.

/s/ *John Paul Stevens*
Associate Justice of the Supreme
Court of the United States

Dated this 3 day of April, 1980.

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

NOTICE

TO: David A. Bochnowski, Suite 1, Cataldi Professional Building, 231 Joliet St., Dyer, Indiana, 46311; William S. Spangler, 31 E. 5th Ave., Gary, Indiana, 46402; James B. Meyer, Teibel Plaza, 833 West Lincoln Highway, Schererville, Indiana, 46375; and, Marjorie H. O'Laughlin, Clerk of the Indiana Supreme Court, 217 State House, Indianapolis, Indiana, 46204.

NOTICE is hereby given to you and each of you that on the 3rd day of April, 1980 Justice John Paul Stevens entered the enclosed order received by Petitioners on April 10, 1980 extending the time in which to file her Petition for Writ of Certiorari in the case of *Justak* v. *Bochnowski, et al.*, PS 404 to May 11, 1980 and docketed the case as A-856 with the U.S. Supreme Court.

Margaret Y. Justak
Margaret Y. Justak
447-139th Street
Hammond, Indiana
219/931-8277

PROOF OF SERVICE

I certify that a copy of the above NOTICE was served upon each of the Respondents through their Counsels of record named above and upon the Clerk of the Indiana Supreme Court by depositing a copy of same into the U.S. Mails, properly addressed with sufficient postage thereon on the 19th day of April, 1980.

Margaret Y. Justak
Margaret Y. Justak

APPENDIX 9

POST-TRIBUNE

Irving Porter and Jasper Counties daily

Thursday — Sept. 6, 1979

2 NAMED TO PROBE HANDLING OF ESTATES

By Charles Kingsbury
P-T Porter County Bureau Chief

VALPARAISO — A Portage lawyer and a Valparaiso certified public accountant were appointed today to probe the handling of estates by William Hiller, former trust officer for the law firm of Clifford, Houran, Hiller and Sullivan.

Named special administrators by Superior Court Judge Bruce Douglas were lawyer John Rhame and CPA Robert Thormahlen.

They will have 30 days to investigate the status of 15 estates submitted to the court by Lawyer Charles T. Clifford.

The latest order was part of a swirling series of events that surfaced after Hiller attempted to commit suicide in a Michigan City motel Aug. 2.

The first of several estates to be probed involves the one of the late Alma G. Wieck.

At a hearing last week, testimony was given that Hiller deposited $40,328.17 check from the estate in the G-Company account in at a Riverdale, Ill. bank last December. Further testimony indicated the money is missing from the estate account.

Hiller is a co-owner of the company.

Hiller failed to appear again today despite a direct order last Friday by Douglas that he be in court.

His attorney, John Lyons, reiterated that his partner, Robert Truitt filed a letter last week stating "it would not be in the best interest of his client" to appear in court.

Douglas also ordered last week that if Hiller couldn't appear, witnesses as to his condition would have to attend to testify to his condition. However, the judge didn't push the issue, stating he was more interested in an accounting of estates Hiller handled.

Lyons indicated to the court that Hiller would refuse to testify, citing the 5th Amendment, if he was forced to appear.

This brought a retort from lawyer Stephen Meyer of Schererville, handling the Wieck estate from which over $47,000 is missing.

"Mr. Lyons knows he can't raise 5th Amendment in civil proceedings," Meyers said.

Douglas said he wanted disinterested special administrators to "go over the estates to give a proper accounting."

"It is important that these people be disinterested," he said.

"I am freezing all these estates until they make their report," the judge said.

Douglas ordered the administrators of the 15 estates, identified by Clifford as those handled by Hiller, to turn over records to the special administrators.

Lyons said he was prepared to turn over to the court the status of the Wieck estate by noon, but Douglas insisted that he wanted a full accounting with a verified, written report on "why wasn't the money in the estate."

Although it wasn't entered in the court record, a reliable source reported "there may be problems in five of the 15 estates submitted by Clifford."

Clifford also said he was working "as speedy as possible on each estate."

"It's time consuming, since some of these estates go back six or seven years," he said. "It would be impossible for us to get an accounting in the next 24 hours."

Meyer tried to get Douglas to order Hiller to return the money invested in the Illinois-based G-Company, but Douglas dismissed the request saying, "The demand is premature."

In the large crowd attending today's hearing were several lawyers taking notes and a representative of the Valparaiso Police Department. Prosecutor Gary Germann ordered the police to launch a full investigation into Hiller's affairs in the wake of his reported suicide try.

Also missing from today's hearing was Dick Beach, a Valparaiso accountant and Hiller's partner in the G-Company.

Douglas also had ordered him to appear.

FILED
JUN 7 1980
MICHAEL RODAK, JR., CLERK

No. 79-1788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MARGARET Y. JUSTAK,

Petitioner,

vs.

A. A. BOCHNOWSKI, JOHN D. COCHRAN, KARL J. STIPHER, STEPHEN A. CLAFFEY, CHARLES E. SCHALLIOL, WILLIAM F. SATTERLEE, III, WALTER SCHRAGE, and FIRST BANK OF WHITING,

Respondents.

Brief Of A. A. Bochnowski, John D. Cochran, Karl J. Stipher, Stephen A. Claffey, Charles E. Schalliol, William F. Satterlee, III, Walter Schrage, and First Bank of Whiting, In Opposition To The Petition For Writ Of Certiorari

WILLIAM S. SPANGLER, SR.
Spangler, Jennings, Spangler & Dougherty, P.C.
8396 Mississippi Street
Merrillville, Indiana 46410
Telephone: (219) 769-2323

Attorneys for Respondents, A. A. Bochnowski, John D. Cochran, Karl J. Stipher, Stephen A. A. Claffey, Charles E. Schalliol, William F. F. Satterlee, III

JAMES B. MEYER
John M. O'Drobinak, P.C.
Teibel Plaza, 838 West Lincoln Highway
Schererville, Indiana 46375
Telephone: (219) 865-1044

Attorneys for Walter Schrage and First Bank of Whiting

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTIONAL GROUNDS	2
CONSTITUTIONAL PROVISIONS AND TRIAL RULES INVOLVED	3
QUESTIONS FOR REVIEW	3
STATEMENT OF CASE	4
ARGUMENT:	
I. Petitioner Has Failed To Show Any Special Or Important Reasons For Review Of This Matter Under Rule 19, Supreme Court Rules	7
II. Writ Of Certiorari Should Be Denied Because No Substantial Federal Question Was Presented Or Decided	8
III. Jurisdiction Of The Highest Court In The State Having Either Obligatory Or Discretionary Power Of Review Must Be Invoked Before The Supreme Court Of The United States Will Review On Certiorari	10
IV. Trial Court's Enforcement Of Indiana Trial Rules Compelling Discovery In A Civil Action Does Not Violate The Fifth Or Fourteenth Amendments To The Constitution	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases

Hammond Packing Co. v. *Arkansas,* 212 U.S. 322, 330, 295 S. Ct. 270, 53 L. Ed. 530 ..... 9, 13

Link v. *Wabash R.R. Co.,* 370 U.S. 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386 9

Magnum Import Co. v. *Coty,* (1922) 262 U.S. 159, 69 L. Ed. 922, 32 S. Ct. 531 8

Patterson v. *Stanolind Oil & Gas Co.,* 305 U.S. 376, 83 L. Ed. 231, 595 S. Ct. 259 9

Rice v. *Sioux City Memorial Park Cemetery,* (1955) 349 U.S. 70, 74, 99 L. Ed. 897, 75 S. Ct. 614 8

Tidal Oil Co. v. *Flanagan,* (1924) 263 U.S. 444, 44 S. Ct. 197, 68 L. Ed. 382 8

Zucht v. *King,* (1922) 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 ..... 8, 9

Other

Moore's Federal Practice, 2nd Ed., 7B (Judicial Code) § 1257 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MARGARET Y. JUSTAK,

Petitioner,

VS.

A. A. BOCHNOWSKI, JOHN D. COCHRAN, KARL J. STIPHER, STEPHEN A. CLAFFEY, CHARLES E. SCHALLIOL, WILLIAM F. SATTERLEE, III, WALTER SCHRAGE, and FIRST BANK OF WHITING,

Respondents.

Brief Of A. A. Bochnowski, John D. Cochran, Karl J. Stipher, Stephen A. Claffey, Charles E. Schalliol, William F. Satterlee, III, Walter Schrage, and First Bank of Whiting, In Opposition To The Petition For Writ Of Certiorari

---

A. A. Bochnowski, John D. Cochran, Karl J. Stipher, Stephen A. Claffey, Charles E. Schalliol, William F. Satterlee, III, Walter Schrage, and First Bank of Whiting, Respondents, pray that a Writ of Certiorari to review the judgments of the Appellate Court of Indiana in the above case be denied.

OPINIONS BELOW

Petitioner has failed to comply with Rule 40-1(a) which requires reference to the official and unofficial reports of the opinions delivered in the Courts below.

The Court of Appeals of Indiana's (Third District) opinion is *Margaret Justak v. A. A. Bochnowski* and these respondents, Appeal No. P.S. 404, filed July 29, 1979, reported in 391 N.E.2d 872, *rehearing denied*. The Supreme Court of Indiana dismissed Petitioner's (Justak's) "Petition to Transfer" for failure to comply with the time requirements of Rule A.P. 11(B) of the Rules of the Supreme Court of Indiana. No opinion of the Supreme Court was published.

JURISDICTIONAL GROUNDS

Petitioner relies upon Supreme Court Rule 21 and "related federal statutory and constitutional provisions of 42 U.S.C. 1983, 1985 and 1986, including the Due Process Clause of Amendments V and XIV of the United States Constitution. There is no concise statement of the subject matter intended to be addressed by Petitioner nor is there any specific ground for jurisdiction related in the brief.

Petitioner further makes no showing of jurisdiction as required by Rule 19 of the Supreme Court of the United States.

Rule 19, Federal Rules—Supreme Court, provides *inter alia*, that a review on a writ of certiorari is not a matter of right, and will be granted only where there are "special and important reasons" therefor. Petitioner has failed to state in her petition any of the "character of reasons" for such review which are specified in Rule 19. Respondents assert that sufficient jurisdictional grounds, as provided by the rules, have not been stated by Petitioner. The writ should, accordingly, be denied on these grounds alone.

CONSTITUTIONAL PROVISIONS AND TRIAL RULES INVOLVED

Petitioner makes no attempt to comply with Supreme Court Rule 40-1(c) which requires designation of the constitutional provisions, etc., and citations, which the case is alleged to involve. Again, such failure warrants denial of the writ.

QUESTIONS FOR REVIEW

The questions for review simply stated are as follows: (1) Whether the Supreme Court of Indiana's dismissal of Petitioner's "Petition to Transfer" for failure to comply with "Indiana Rules of Trial Procedure" entitles Petitioner to a review by this Court; (2) Whether the Court of Appeals of Indiana's decision affirming a trial court's dismissal of Petitioner's cause of action for failure to comply with the discovery rules under Indiana Trial Rules entitles Petitioner to a review by this Court; (3) Whether the jurisdiction of the highest Court in the State of Indiana was invoked by Petitioner in compliance with § 1257 of the Judiciary Act, which invocation is required as a prerequisite to filing a Petition For Certiorari; (4) Whether Petitioner's failure to make discovery in accordance with the Indiana Rules of Procedure and the trial court's subsequent dismissal of her action was violative of the Fifth (5th) and Fourteenth (14th) Amendment of the United States Constitution.

STATEMENT OF CASE

Petitioner (Justak) in her complaint sought to recover damages which were allegedly occasioned by the acts of appellees (Respondents) in connection with the estate of her deceased husband.

Notices were duly filed in the Jasper Circuit Court on January 9, 1976, and served upon Petitioner to take her deposition on January 29, 1976. Petitioner failed to appear without notice to anyone. On March 20, 1976 the court set petitioner's Motion for Postponement of Deposition of Margaret Justak and petitioner's Motion for Protective Order Under T.R. 26(c)(3) limiting Method of Discovery Allowed to Defendants (Respondents), for hearing on April 26th, 1976. Again, all respondents appeared but petitioner failed to appear for hearing.

On April 26, 1976, the trial court ordered petitioner to appear for deposition. The Order further provided: "If she (petitioner) should fail to appear as ordered herein on said date at said time and place, the court shall dismiss this action."

On the 3rd day of June, 1976, the petitioner physically appeared for the deposition, but stated that she had taken drugs and was in no condition, because of the medication, to proceed with the deposition. She further stated under oath that she was not responsible for what she would say at the deposition. Accordingly, the deposition was not taken.

On the 21st day of June, 1976, the Court, with petitioner appearing in person, entered the following order:

"The Court having been advised in open court, with all parties present, that the taking of the plaintiff's deposition scheduled on the 3rd day of June, 1976, at the hour of 10:00 O'clock A.M. before Gerry R. Yates, Official Court Reporter, United States District Court, Northern District of Indiana, was continued in view of the statement of the plaintiff that she was not physically or mentally able to proceed with the taking of the deposition, heretofore ordered to be taken, pursuant to and in accordance with the rules of Indiana Procedure.

Counsel for the defense, now in open Court, makes oral request that the Court fix a new date, time and place for the plaintiff Margaret Y. Justak to appear and present testimony consistent with the rules of procedure permitting discovery.

The request made by counsel for the defendants is granted and the Court now finds that Margaret Y. Justak should present herself for the taking of her deposition, and that she appear at a time, on a date, in a place certain, physically and mentally able to present testimony, as provided by and in accordance with the rules of discovery; or in the event she is not physically and mentally able to testify, that she present to this Court a sworn affidavit from a regular medical practitioner stating that said plaintiff is unable to proceed with the deposition; or upon failure to so do, and in the event plaintiff is unable to proceed with the deposition, the Court shall suspend all action and dismiss this action until said plaintiff is able to pursue and comply with said rules.

Accordingly, the Court now orders Margaret Y. Justak to make herself available to resume the taking of her deposition and that the said Margaret Y. Justak appear physically and mentally able, for the taking of her deposition before Gerry R. Yates, Official Court Reporter, United States District Court, Northern District of Indiana, Hammond Division, 507 State Street, Hammond, Indiana,

46320, or one of her assistants, on the 19th day of July, 1976, at the hour of 10:00 O'Clock A.M. Central Daylight Time, and if she should fail to appear as ordered herein on said date at said time and place, the Court shall dismiss this action. Further, it is ordered that in the event said plaintiff Margaret Y. Justak is not physically and mentally able to testify that she present timely to this Court a sworn affidavit made by and from a regular medical practitioner stating that said plaintiff is unable to proceed with the taking of said deposition or upon failure to so do and the plaintiff is unable to proceed with the taking of said deposition, the Court shall suspend all action and dismiss this action until the said Margaret Y. Justak plaintiff is able to pursue and comply with the rules of Indiana Procedure relating to discovery by the defendants.

The Clerk of the Pulaski Circuit Court is directed to mail a copy of this order to Margaret Y. Justak, 447-139th Street, Hammond, Indiana 46320 registered mail with return receipt requested.

Copies of this memorandum are mailed to counsel.

Dated and done this 21st day of June, 1976.

/s/ Harold R. Staffeldt, Judge
Pulaski Circuit Court"

(TR. p. 144-146)

Petitioner failed to comply with the aforementioned Court's Order.

Judgment was subsequently entered dismissing plaintiff's action (Appendix 1). Petitioner's Motion to Correct Errors was overruled and petitioner appealed to the Court of Appeals.

The Court of Appeals unanimously affirmed the trial court's decision and judgment (Appendix 8). Petitioner filed Petition for Rehearing before the Court of Appeals,

which was denied on April 29, 1979. Petitioner subsequently filed a Petition to Transfer to the Supreme Court of Indiana (Indiana's highest Court). Petition to Transfer was dismissed for failure to comply with a time requirement of Indiana Rule A.P. 11(B). Petitioner has failed to include a copy of the Petition to Transfer in her appendix.

ARGUMENT

I

PETITIONER HAS FAILED TO SHOW ANY SPECIAL OR IMPORTANT REASONS FOR REVIEW OF THIS MATTER UNDER RULE 19, SUPREME COURT RULES.

Rule 19 of this Court provides in part that review on writ of certiorari will be granted only where there are "special and important reasons therefor." The "character of reasons" for granting the writ are herein outlined, none of which are here invoked, nor does petitioner state the character of reasons which should be considered by the Court in this case.

As there special and important reasons for granting the writ here? This case simply involved the enforcement of the Indiana Trial Rules and affirmance of the trial court's action by the Court of last resort in Indiana. There is no statute involved; moreover, petitioner does not contest the constitutionality of the discovery rules involved, or the Court's right to enforce them. Her only contention is that the Court should not enforce the rules against her.

Even assuming, *arguendo*, that the decision of the Indiana state court is erroneous, this is not a matter of

"substance" in the constitutional sense. This Court does not sit for the benefit of particular litigants. *Magnum Import Co. v. Coty*, (1922) 262 U.S. 159, 69 L.Ed. 922, 32 S.Ct. 531. As Mr. Justice Frankfurter pointed out:

> "Special and important reasons imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions . . ." *Rice v. Sioux City Memorial Park Cemetery*, (1955) 349 U.S. 70, 74, 99 L.Ed. 897, 75 S.Ct. 614.

Writs of certiorari should be used sparingly to bring up cases of public importance. This does not have the "surface appearance of public importance." *Rice v. Sioux City Memorial Park Cemetery, supra.*

II.

WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION WAS PRESENTED OR DECIDED.

Petitioner's sole issue presented is posited as follows: The trial court should not have enforced the Indiana Trial Rules by dismissing her case for wilfully refusing to make discovery, notwithstanding the fact that petitioner had been preadvised by the trial court that such action would be taken in the event she failed to comply with the court's order compelling discovery.

To afford the basis for review, either by appeal or certiorari, the federal question upon which the state court judgment hinges must be substantial. *Zucht v. King*, (1922) 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194; *Tidal Oil Co. v. Flanagan*, (1924) 263 U.S. 444, 44 S.Ct. 197, 68 L.Ed. 382. The Court in *Zucht, supra* stated:

> "But although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional

> question presented is not, and was not at the time of granting the writ, substantial in character. *Sugarman v. United States*, 249 U.S. 182, 184." *Zucht, supra*, at 176.

One of the attributes of a substantial federal question is the novelty of the question being presented to the Court. In the case of *Patterson v. Stanolind Oil & Gas Co.*, 305 U.S. 376, 83 L.Ed. 231, 59 S.Ct. 259, this Court was confronted with a decision on appeal, which decision was consonant with well settled principles of law. The Court in *Patterson* stated:

> "In that view, the state court applied well settled principles in denying plaintiff's contentions under the 14th Amendment. . . . The argument that regulatory provisions of the statute authorizing the commission to make its order fixing the drilling unit are void for indefiniteness, is without merit.
>
> In light of our previous decisions, the plaintiff has failed to raise a substantial federal question, and the appeal is dismissed for want of jurisdiction."

Thus, if a question has been previously adjudicated by this Court upon well settled principles, no substantial federal question is presented.

This Court has previously refuted the proposition that dismissal of an action for failure to comply with trial rules by a trial court, is not violative of the 5th and 14th Amendments to the Constitution. Accordingly, no substantial federal question exists and this petition for certiorari should be denied. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386; *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 330, 29 S.Ct. 270, 53 L.Ed. 530.

III.

JURISDICTION OF THE HIGHEST COURT IN THE STATE HAVING EITHER OBLIGATORY OR DISCRETIONARY POWER OF REVIEW MUST BE INVOKED BEFORE THE SUPREME COURT OF THE UNITED STATES WILL REVIEW ON CERTIORARI.

Petitioner in the case at bar failed to invoke the power of review of the Indiana Supreme Court (the highest court in Indiana) in accordance with its rules. She failed to comply to the rules which resulted in the Supreme Court of Indiana entering an order of dismissal of her Petition to Transfer.

Moore's Federal Practice, 2nd Ed., 7B (Judicial Code) § 1257 succinctly summarizes the applicable principle which is here adopted by respondent.

> "Jurisdiction of the highest court in the state having either obligatory or discretionary power of review must be invoked. *Gotthilf v. Sills* (1963) 375 US 79, 84 S Ct 187, 11 L ed2d 159 (This prerequisite is not satisfied where the highest court of the state refuses to review because the proper state appellate procedure was not observed. New York Court of Appeals dismissed, for want of jurisdiction, both a motion for leave to appeal and an appeal as of right from the Appellate Division. Proper New York procedure was to apply to the Appellate Division for leave to appeal upon certified questions. Since this was not done, the judgment of the Appellate Division was not that of the highest court of New York within the meaning of § 1257.); *Great Western Telegraph Co. v. Burnham* (1896) 162 US 339, 16 S Ct 850, 40 L ed 991; *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Rock* (1929) 279 US 410, 49 S Ct 363, 73 L ed 766."

The highest court of the State of Indiana refused to review because proper State Appellate procedure was not observed. Petitioner has failed to comply with the essential prerequisite and is not entitled to review in this Court.

IV.

TRIAL COURT'S ENFORCEMENT OF INDIANA TRIAL RULES COMPELLING DISCOVERY IN A CIVIL ACTION DOES NOT VIOLATE THE FIFTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION.

Petitioner's Appendix 8 through 18 disclosed the detailed facts surrounding her failure to make discovery under the Indiana Trial Rules. The material trial court's finding of facts, which were affirmed by the Appellate Court of Indiana, are as follows:

> "8. The plaintiff appeared and was sworn in for the taking of her deposition of July 19, 1976, as scheduled. . . . [T]he Defendants were prevented from completing this deposition as the result of the plaintiff again claiming sudden and debilitating illness. Credible and proper medical evidence to support this claim has not been presented to the Court.
>
> 9. Plaintiff failed, as required by the Order of this Court to timely file with this Court a sworn affidavit made by and from a regular, licensed medical practitioner stating the plaintiff is unable to proceed with or to give her deposition.
>
> 10. The plaintiff has energetically participated in several lengthy hearings before this Court, all without physical difficulty or illness.
>
> 11. The plaintiff has repeatedly and willfully refused to comply with the orders of this Court respecting discovery. The evasive and obstructive tactics of the plaintiff have been in bad faith and are without meritorious excuse or justification. The Defendants have been thwarted without good cause and to their detriment from obtaining discovery for over one year.
>
> 12. The claims of the plaintiff have not been supported by proper and credible evidence and her

behavior has been inexcusable. The Defendants have suffered irreparable harm and will continue to be damaged were this action to be permitted to continue.

13. Every reasonable effort has been made by the Court and the Defendants to compel the plaintiff to submit to proper and meaningful discovery, all without success.

14. A grant of relief to the Defendants short of dismissal of the action with prejudice will not be adequate or effective. Additional leniency or patience is not appropriate. The plaintiff has abused the Court and its orders. The plaintiff has filed numerous dilatory, obstructive and sham pleadings and motions in an effort to continue her avoidance of discovery. The claims of the plaintiff have approached a scandal and contempt on this Court and the Defendants.

15. It is the duty of this Court, under Trial Rule 37(B), to prevent abuse of discovery proceedings and to secure enforcement of the discovery provisions of the Trial Rules. Dismissal of plaintiff's action with prejudice is an appropriate remedy under the factual circumstances presented to this Court and necessary to properly protect the integrity of the discovery rules of this Court and State and the rights of the Defendants. This Court specifically finds and determines that the conduct of the plaintiff had and will continue to so delay and obstruct the rights of the Defendants, that relief other than Dismissal with prejudice would be inadequate."

"The trial court then entered an order dismissing Justak's complaint with prejudice." (Petitioner's Appendix 11 and 12)

Trial Rule 37 of the Indiana Rules of Court, Section A(4) provides as follows:

(4) The Court may enter total or partial judgment by default or dismissal with prejudice against

> a party who is responsible under subdivision (B)(2) of this rule if the court determines that the party's conduct has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate.

Petitioner does not contest the constitutionality of Rule 37 but simply contends that the rule should not have been enforced against her. The trial court and the Court of Appeals of Indiana held otherwise. This Court has unequivocably held that the State courts have a right to enforce their trial rules and such enforcement is not repugnant to the Constitution.

The Court in *Hammond Packing Co. v. Arkansas, supra,* which clearly supports denial of the petition in this case stated:

> "as the power to strike an answer out and enter default . . . which is before us, is clearly referable to the undoubted right of lawmaking authority to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation." *Hammond Packing Co., supra,* at 353, 354.

The trial court in this action rightfully exercised its discretion in dismissing plaintiff's action in accordance with Trial Rule 37. The soundness of this judicial decision was affirmed by the Appellate Court of Indiana.

CONCLUSION

Respondents respectfully submit that this case is not a proper one for review by certiorari by this Court, and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM S. SPANGLER, SR.
Spangler, Jennings, Spangler & Dougherty, P.C.
8396 Mississippi Street
Merrillville, Indiana 46410
Telephone: (219) 769-2323

Attorneys for Respondents, A. A. Bochnowski, John D. Cochran, Karl J. Stipher, Stephen A. A. Claffey, Charles E. Schalliol, William F. F. Satterlee, III

JAMES B. MEYER
John M. O'Drobinak, P.C.
Teibel Plaza, 838 West Lincoln Highway
Schererville, Indiana 46375
Telephone: (219) 865-1044

Attorneys for Walter Schrage and First Bank of Whiting